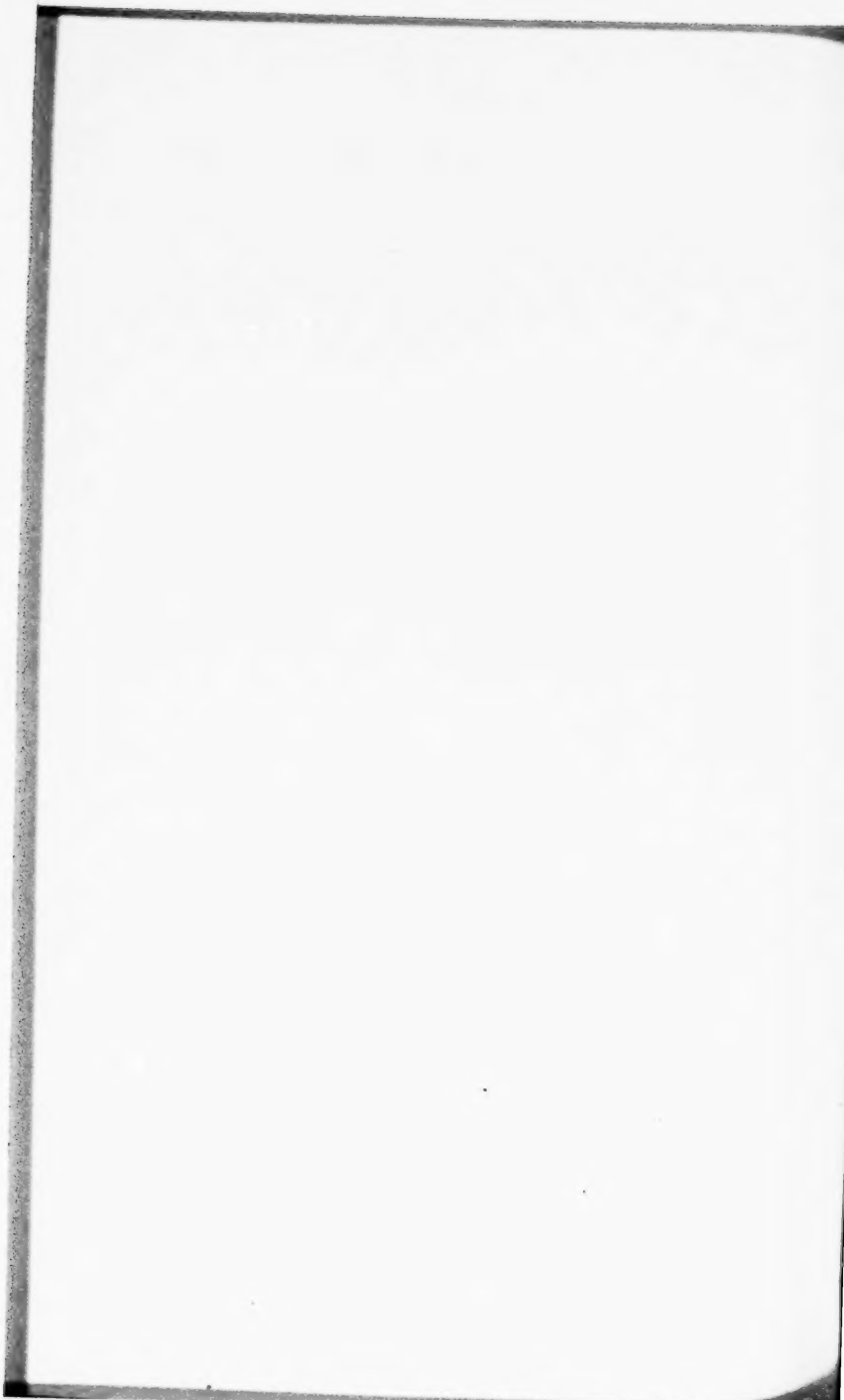

WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error
(And Petitioner in Certiorari),

vs.

STATE OF MISSOURI, at the Information of JESSE W. BARRETT, Attorney-General,
Defendant in Error
(And Respondent in Certiorari).

No. ~~919~~ 252

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JAMES C. JONES,
FRANK H. SULLIVAN,
For Plaintiff in Error.

JONES, HOCKER, SULLIVAN & ANGERT,
506 Olive St., St. Louis, Mo.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Main 1819, Central 919.

INDEX.

Authorities Cited.

As to the Right of the State:

As to the Powers of the Bank:

As to Interpretation of R. S., U. S., Sec. 5190:

As to Departmental Construction:

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS, Plaintiff in Error (And Petitioner in Certiorari), vs. STATE OF MISSOURI, at the Information of JESSE W. BARRETT, Attorney-General, Defendant in Error (And Respondent in Certiorari).	No. 919.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The Attorney-General of the State of Missouri filed in the Supreme Court of that state an information in quo warranto (Rec., pp. 1-3), wherein it was alleged: That the plaintiff in error was a banking association organized under the laws of the United States; that by its articles of association and cer-

tificate of incorporation the City of St. Louis in Missouri was designated as its place of business; that for a number of years it had conducted its banking business at a designated building in that city; that it had recently opened a branch office at another place within the city, for the transaction of banking business, and contemplated and intended to establish still other such branches in the city, and that the plaintiff in error was without authority of law to have or maintain branch offices for the conduct of its banking business within the City of St. Louis. The prayer was that the plaintiff in error be ousted of the asserted right.

Upon this showing an order to show cause issued (Rec., p. 4). On the prayer of the informant (Rec., p. 3) a temporary injunction issued (Rec., p. 4), restraining plaintiff in error from going forward with its plans to establish branch offices, pending the cause. The plaintiff in error seasonably, but unsuccesstully, asked the dissolution of this injunction as having been obtained in violation of the Revised Statutes of the United States, Section 5242 (Comp. St. 1916, Sec. 9834).

The plaintiff in error also filed its motion (Rec., p. 6) to dismiss the proceeding on the ground that the State and her Attorney-General did not possess the power of visitation attempted to be exercised.

It also submitted a demurrer (Rec., p. 6) in which it contended that the information stated no facts justifying the proceeding; that the Court was without jurisdiction thereof, and that the proceeding was one which only the Government of the United States could maintain.

In due course, and on March 3, 1923, the Court delivered its opinion (Rec., pp. 8-16) and pronounced its judgment (Rec., p. 7) ousting the plaintiff in error of the power and privilege of possessing and operating branch banks.

In apt time (Rec., pp. 17 et seq.) the plaintiff in error sued out its writ of error here, and, in doubt as to the proper method of review, has also applied for a writ of certiorari, which application has been docketed, and ordered to be submitted with the writ of error.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Missouri erred in holding that it lay within the province of the State of Missouri or the Attorney-General of the state to maintain such a proceeding as this to define the powers of a national banking association, and to restrain such an institution within the powers as thus defined (Assignment of Errors Nos. III, IV, VII, VIII, Rec., p. 18; Petition for Certiorari, pp. 6, 7 and 8).

II.

The Supreme Court of the State of Missouri erred in denying the contention of the plaintiff in error that, the plaintiff in error being a national banking association organized under the laws of the United States, the powers asserted by it being those granted or grantable only by the United States, for that reason it was not within the sovereign authority of the State of Missouri to define the powers of the plaintiff in error under its charter or to restrain it in the exercise thereof (Assignments of Error Nos. V, VI and VII, Rec., p. 18; Petition for Certiorari, pp. 8 and 9).

III.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that the proceeding here involved was one of which the Government of the United States has sole and exclusive sovereignty and power; and that, therefore, the state and her Attorney-General were without power or authority to institute or maintain such a proceeding (Assignments of Error V, VI and VII, Rec. p. 18; Petition for Certiorari, pp. 8 and 9).

IV.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that neither the State of Missouri nor the Attorney-General thereof had power or authority to question the right of the plaintiff in error under the laws of the United States to establish and operate branches of its banking business in the City of St. Louis, State of Missouri (Assignments of Error No. VIII, Rec., p. 18; Petition for Certiorari, p. 8).

V.

The Supreme Court of Missouri erred in denying the contention of the petitioner that Sections 11,684 and 11,737 of the Revised Statutes of Missouri of 1919, if interpreted to restrict the powers of national banking associations in the matter of branch offices

or banks, are unconstitutional and void because dealing with a matter within the exclusive province of the Federal Government (Assignments of Error No. X, Petition for Certiorari, p. 9).

VI.

The Supreme Court of Missouri erred in holding and determining that acts of Congress conferring jurisdiction upon state courts over actions against national banking associations (Judicial Code, Section 24, Subdivision 16; R. S. U. S., Sections 5136, 5138, and Act of July 12, 1882, found in Compiled Statutes 1916, Section 9668) conferred authority upon the state, and jurisdiction upon her courts to proceed as here in the exercise of a sovereign power, which is the sole prerogative of the National Government (Assignment of Error II, Rec., p. 18; Petition for Certiorari, p. 6).

VII.

Under its charter and the acts of Congress relating to national banking associations, the plaintiff in error is possessed of power to establish and maintain branch offices in the City of St. Louis for the conduct of its banking business; and the Supreme Court of Missouri is in error in ruling to the contrary (Assignments of Error IX, Rec., p. 18; Petition for Certiorari, p. 8).

STATE STATUTES REFERRED TO BY THE MISSOURI SUPREME COURT (REC., P. 15).

Revised Statutes of Missouri of 1919, Article I of Chapter 108, providing for the establishment of a State Banking Department:

"Sec. 11684. **Prohibition of banking business.** —No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108)."

Article II of Chapter 108, providing for the incorporation of banks:

"Sec. 11737. **Rights and powers.**—Every such corporation shall be authorized and empowered:

1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and nonnegotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest: **Provided, however,** that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house."

BRIEF.

I.

Quo warranto is a writ of right of the sovereign.

Ames v. Kansas, 111 U. S. 460;
Terrett v. Taylor, 9 Cranch. 51.

II.

As addressed to a national banking association to restrain it within the corporate grant, it is the sole prerogative of the National Government.

McCulloch v. Maryland, 4 Wheat. 229 (435);
Osborne v. United States Bank, 9 Wheat. 863;
Farmers etc. Bank v. Dearing, 91 U. S. 30 (33);
Territory v. Lockwood, 3 Wall. 238;
McClung v. Silliman, 6 Wheat. 303;
First National Bank v. Union Trust Co., 244 U. S. 427;
Van Reed v. Peoples National Bank, 198 U. S. 554;
State ex rel. v. Curtis, 35 Conn. 374;
State ex rel. v. Bowen, 8 S. C. 400;
Harkness v. Guthrie, 27 Utah 248 (s. c.) Guthrie v. Harkness, 199 U. S. 156;
State ex rel. v. Cincinnati etc. Ry. Co. (Ohio), 7 L. R. A. 319.

III.

The State may not exercise sovereign powers which are the exclusive function of the United States.

Cases, supra, and
Ableman v. Booth, 21 How. 516;
In re Tarble, 13 Wall. 405;
Tennessee v. Davis, 100 U. S. 263;
Easton v. Iowa, 188 U. S. 220.

IV.

State legislation cannot regulate the charter powers of national banking associations.

McCulloch v. Maryland, 4 Wheat. 316;
Osborne v. United States Bank, 9 Wheat. 738;
Farmers etc. Bank v. Dearing, 91 U. S. 30;
Easton v. Iowa, 188 U. S. 220;
Van Reed v. Peoples National Bank, 198 U. S. 554.

V.

In the sense of independenet institutions, plaintiff in error is not charged with establishing branch banks, but merely branch offices of its bank in St. Louis (Rec., p. 1).

VI.

R. S. U. S., Sec. 5190, has reference to the city in which the bank is located, and not to its place of business therein.

McCormick v. Market National Bank, 165 U. S. 549 (s. c.) 162 Ill. 100.

VII.

It is within the incidental powers of a national banking association to have branch offices in the city where its business is conducted, for the enlargement of its banking business, and the better accommodation of its patrons.

Green Bay v. Steamboat Co., 107 U. S. 98;
People v. Pullman etc. Co., 175 Ill. 125;
State v. Hancock, 35 N. J. L. 537;
Gas etc. Co. v. Dairy Co., 60 Ohio St. 96;
Union Bank v. Jacobs, 25 Humph. (Tenn.) 515;
Barry v. Merchants Exchange, 1 Sandf. Chy. (N. Y.) 280;
Willmarth v. Crawford, 10 Wend. (N. Y.) 341;
Wright v. Hughes, 119 Ind. 324.

VIII.

R. S. U. S., Sec. 5190, requiring a national banking

association to have "an office," is not to be interpreted as forbidding but the office required.

Century Dictionary "a," "an";
United States v. Oregon etc. Railway Co., 164 U. S. 526;
State ex rel. v. Martin, 60 Ark. 343;
National etc. Bank v. Copeland, 171 Mass. 257;
Thompson v. Association, 8 C. B. 848;
European etc. Railway Co. v. Westall, 6 Best & Smith, 970;
Chicago etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97;
United States v. Alabama etc. Ry. Co., 142 U. S. 615;
United States v. Finnell, 185 U. S. 236;
Swift & Co. v. United States, 105 U. S. 691;
Studebaker v. Perry, 184 U. S. 268.

IX.

There has been no such departmental construction as requires a different ruling.

Merritt v. Cameron, 137 U. S. 550;
United States v. Healy, 160 U. S. 136;
United States v. Philbrick, 120 U. S. 52;
Chicago etc. Railway Co. v. McCaull-Dinsmore 253 U. S. 97;
United States v. Alabama etc. Railway Co., 142 U. S. 615;
United States v. Finnell, 185 U. S. 236;
Swift & Co. v. United States, 105 U. S. 691;

Studebaker v. Perry, 184 U. S. 268;
State v. Ins. Co., 175 Ind. 59;
Schuyler v. Southern Pacific Co. (Utah), 109 Pac. 458.

X.

The asserted power exists or not, under the law, and no departmental action being required, abstract departmental rulings have no place in the inquiry.

Authorities, supra, and
State v. Mutual Life Ins. Co., 175 Ind. 59;
Schuyler v. Southern Pacific Co., 109 Pac. (Utah) 458.

ARGUMENT.

The Power of the State in the Premises.

At the threshold of the case, of course, lies the question of the power of the state to proceed by an information in the nature of a writ of quo warranto to delimit and define the powers of a corporation created by the National Government, and to restrain the corporation within the limits, or supposed limits, of its powers as thus defined. That, if such a power exists, it is, or may be, of far-reaching consequences is certain. For if the state may restrain the corporate functioning of national banking associations in the manner here attempted, it will become exceedingly difficult to set any limit to its power in that regard. If it may deny a national banking association the power to have more than one place of business in the state, why may it not deny the power to have any such?

The supremacy of the National Government with respect to corporations created by it in the execution of its constitutional powers cannot admit of question. The question here really concerns the division of sovereignty which lies at the foundation and fundamentals of our system of government.

For the writ here sued out, and the proceeding here instituted, is the exercise of supreme sovereign power. Massachusetts Bay Colony lost her chartered liberties by no other proceeding than that here under review. The judgment there was that the charter be forfeited unto the crown, i. e., that the franchise be restored unto the sovereign which had created the thing and granted the franchise (Wilson's History of the American People, Vol. I, pp. 284-5).

Such is always the effect of the judgment in such a proceeding, if the sovereign prevails.

In Terrett v. Taylor, 9 Cranch 51, Mr. Justice Story, speaking for the Court, observed:

> "A private corporation created by the Legislature may lose its franchise by a misuser or a nonuser of them; and **they may be resumed** by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture."

As said by Mr. Justice Waite, speaking for the Court, in Ames v. Kansas, 111 U. S. 460;

> "The original common-law writ of quo warranto was a civil writ, at the suit of the crown, and not a criminal prosecution (**Rex v. Marsden**, 3 Burr. 1812, 1817). **It was in the nature of a writ of right by the king against** one who usurped or claimed franchises or liberties, to in-

quire by what right he claimed them (Com. Dig. Quo Warranto A), and the first process was summons (Id. C. 2). This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which, in its origin, was 'a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or **seize it for the crown**' (3 Bl. Com. 263). Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, **seizing the franchise**, or ousting the wrongful possessor; the fine being nominal only' (3 Bl. Com. supra; The King v. Francis, 2 T. R. 484; Bac. Ab. Tit. Information D; 2 Kyd on Corp. 439)."

Wherefore the inquiry arises: If this corporation has attempted the exercise of a franchise granted or **grantable** only by the national government, by what authority would the state undertake to seize it?

A proper consideration of the relations between the state and national governments, as defined by this Court when occasion has rendered it necessary, furnishes a plain answer to this inquiry.

The cases of McCulloch v. Maryland, 4 Wheat. 316, and Osborne v. United States Bank, 9 Wheat. 738, dealt with much more than the power of the states to lay an incidental tax upon the property of a bank

created by the national government. The Court there dealt, as here, with an asserted power, on the part of the state, to regulate, and even to destroy.

For, says Charles Warren in The Supreme Court in United States History, Vol. I, p. 503, at the time those cases came to the bar of the Court for consideration this was the situation:

> "Indiana in its Constitution of 1816 prohibited the establishment of branches of any bank chartered outside of the state. The Illinois Constitution of 1818 prohibited the existence of any but state banks within the states. In November, 1817, Tennessee imposed a tax of $50,000 on any other than a state bank doing business in the state; in December, 1817, Georgia laid a tax of 31¼ per cent on every $100 of bank stock employed within the state (the legislature declaring, by resolve, the next year, that this tax was only intended to apply to branches of the Bank of the United States); North Carolina, in December, 1818, imposed an annual tax of $5,000 on the branches of the bank. In Febraury, 1818, there was enacted in Maryland a statute laying a heavy stamp tax on all notes issued by banks chartered outside the state, which tax might be commuted by the annual payment of $15,000; in January, 1819, Kentucky imposed a still heavier tax, compelling each branch in that state to pay $60,000 annually; the next month, February, 1819, Ohio rivaled Kentucky with a tax of $50,000 on each branch."

It was this attempt to regulate, control and forbid the operations of agencies of the Federal Government which furnished the basis for the judgments in those two historic proceedings. How can the power of the state here asserted stand, in the face of this language of Mr. Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. 229 (p. 435):

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them."

If, as there distinctly declared, the sovereignty of a state does not extend to a national bank, how can this proceeding be maintained, having in mind the fact that it is the supreme exercise of sovereignty?

The doctrine was further elaborated in Osborne v. United States Bank, 9 Wheat. 863, and the incapacity

of the state to control national banks declared by the Chief Justice in this language:

> "The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.
>
> **"Were the secretary of the treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so.** If, instead of the secretary of the treasury, distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense, the profits of the banking business, instead of other emoluments to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the Union possess a right to control these operations?"

This inquiry the opinion answers in the negative. From which it is clearly deducible that the power of the state to control the corporate functions of a national banking association is no greater than its power to control an officer of the Federal Government in the exercise of the official functions vested in him.

In Farmers etc. Nat. Bank v. Dearing, 91 U. S. 30, the question at issue was the power of the state to prescribe by law a penalty for excessive interest charges by a national bank. Mr. Justice Swayne, writing the opinion of the Court, said this respecting national banks and the right of the state to control their activities (p. 33):

> "The national banks organized under the act are instruments designated to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.
>
> "Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.' Against the national will 'the states have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control, the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government' (**Bank of the United States v. McCulloch, supra; Weston and Others v. Charleston**, 2 Pet. 466; **Brown v. Maryland**, 12 Wheat. 419; **Dobbins v. Erie County**, id. 419).

"The power to create carries with it the power to preserve. The latter is a corollary from the former.

"The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the general government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

"Those which belong exclusively to the states.

"Those which belong exclusively to the National Government.

"Those which may be exercised concurrently and independently by both.

"And those which may be exercised by the states, but only with the consent, express or implied, of Congress."

It is believed to be certain that the power, by means of high prerogative writs, to restrain these creatures of the National Government within the limits of the powers conferred upon them is one which, under this classification, belongs inherently and exclusively to that sovereign which gave them being, and alone

possesses power to grant, enlarge or restrict their corporate franchises.

In Ableman v. Booth, 21 How. 516, the division of sovereignty under our dual system of government was thus defined by Mr. Chief Justice Taney (p. 138):

> "The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty, and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States, and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so, for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated

to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned."

Note.—This case dealt with the power of a state court to discharge a prisoner, held under process from a court of the United States, on the ground that the law under which he was held was invalid.

And in Tarble's case, 13 Wall. 405, where a state court discharged a deserter from the army on the ground that his enlistment was invalid, Mr. Justice Field, delivering the opinion of the Court, said on the same subject, after quoting the above extract from Ableman's case:

"It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several states, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of

each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments."

* * * * * * *

"Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

And in Tennessee v. Davis, 100 U. S. 263, Mr. Justice Davis said for the Court:

> "The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will or withhold from it, or a moment, the cognizance of any subject which that instrument has committed to it."

The high prerogative character of the writ here under consideration, and the sovereignty to which it appertains, is in effect pointed out in Territory v. Lockwood, 3 Wall. 238. Lockwood, having been appointed to office in a territory by the President, the Attorney-General of the territory sued out a writ of quo warranto to oust him therefrom. It was held that, as the source of the office was the general government, only the general government could institute the proceeding. Said Mr. Justice Swayne, speaking for the Court in that case:

> "The writ of quo warranto was a common-law writ. In the course of time it was superseded by the speedier remedy of an information in the

same nature. It was a writ of right for the king. In the English courts an information for an offense differs from an indictment, chiefly in the fact that it is presented by the law officer of the crown without the intervention of a grand jury. Whether filed by the Attorney-General or the Master of the Crown Office, and whether it relates to public offenses or to the class of private rights specified in the statute of 9 Ann. Ch. 20, in relation to which it may be invoked as a remedy, it is brought in the name of the king, and the practice is substantially the same in all cases. Any defect in the structure of the information may be taken advantage of by demurrer.

"In this country the proceeding is conducted in the name of the state or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect.

"In Wallace v. Anderson, this court said, 'that a writ of quo warranto could not be maintained except at the instance of the government; as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question.' In the case of the Miners' Bank v. United States, on the relation of Grant, the information was filed in the name of the United States in the District Court of Iowa Territory. The sufficiency of the information in this respect does not appear to have been questioned. A state court cannot issue a writ of mandamus

to an officer of the United States. 'His conduct can only be controlled by the power that created him.' The validity of a patent for land issued bp the United States 'is a question exclusively between the sovereignty making the grant and the grantee.'

"The Judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the territory have no agency in appointing them and no power to remove them. The territorial legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the territory to prosecute such an information as this would carry with it the power of a motion without the consent of the government from which the appointment was derived. This the territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the states as to the federal officers whose duties are to be discharged within their respective limits. The right to institute such proceedings is inherently in the government of the nation. We do not find that it has been delegated to the territory."

And in McClung v. Silliman, 6 Wheat. 303, the power of a state court to address a writ of mandamus

to a register of an United States land office was denied, Mr. Justice Johnson for the Court observing:

> "It is not easy to conceive on what legal ground a state tribunal can in any instance exercise the power of issuing a mandamus to the register of a land office. * * * And no one will seriously contend, it is presumed, that it is among the reserved powers of the states, because not communicated by law to the courts of the United States.
>
> "There is but one shadow of a ground on which such a power can be contended for, which is the general rights of legislation which the states possess over the soil within their respective territories. It is not now necessary to consider that power, as to the soil reserved to the United States, in the states respectively. The question in this case, as to the power of the state courts over the officers of the general government employed in disposing of that land, under the laws passed for that purpose. And here it is obvious that he is to be regarded either as an officer of that government or as its private agent. In the one capacity or the other his conduct can only be controlled by the power that created him; since whatever doubts have from time to time been suggested, as to the supremacy of the United States in its legislative, judicial or executive powers, no one has ever contested its supreme right to dispose of its own property in its own way."

The state court rested its judgment in the case at bar, in large measure, upon the utterances of this Court in McClellan v. Chipman, 164 U. S. 356, and Davis v. Bank, 161 U. S. 275, declaring the power of the state to bind national banks by legislation, prescribing regulations for the community at large; as to which, in McClellan's case, 164 U. S. 356, Mr. Justice White observed:

> "National banks 'are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be used for debts, are all based on state law.'"

But it is one thing for a state, legislating for the community, to prescribe regulations binding upon national banks as members of the community; and another entirely for the state to seek to regulate or control corporate functions derived from the general government.

In Easton v. Iowa, 188 U. S. 220, state legislation in the latter field was held invalid. In that case Mr. Justice Shiras, speaking for the Court, said:

> "We think that this view of the subject is not based on a correct conception of the federal

legislature creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in McCulloch v. Maryland, 4 Wheat. 316, 425, and in Osborn v. United States Bank, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.

"In the latter case, it was said by Chief Justice Marshall:

"'The bank is not considered as a private corporation, whose principal object is individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole

opinion of the Court, in McCulloch v. Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the Government of the United States."'

"A similar view of the nature of banks organized under the national bank laws has been frequently expressed by this Court. Thus, in Farmers' National Bank v. Dearing, 91 U. S. 29, it was said:

"'National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end.'

"Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation, and the Supreme Court of Iowa was in error when it held that national banks are organized and their business prosecuted for private gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking."

And after reviewing numerous state and federal decisions, the opinion in that case concludes (l. c. 238-239):

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to

the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

In First National Bank v. Union Trust Company, 244 U. S. 427, congressional sanction was expressly held required for such a proceeding as here by state authorities. That case had many features similar to this, with the basic exception that **in that case there was congressional sanction for the proceeding; while, in this case there is no claim of such.** In that case, the Attorney-General of the state had brought such a proceeding as here in a state court to test the right of a national bank to exercise certain powers claimed

under an act of Congress. This Court justified the proceeding on the ground that Congress had authorized it by the terms of the particular Act of Congress there under consideration. The narrow ground upon which the case proceeded in this respect is indicated by this language of Mr. Chief Justice White, speaking for the majority:

> "The question of the competency of the procedure and the right to administer the remedy sought, then remains. It involves a challenge of the right of the state Attorney-General to resort in a state court to proceedings in the nature of quo warranto to test the power of the corporation to exert the particular functions given by the Act of Congress because they were inherently federal in character, enjoyed by a federal corporation and susceptible only of being directly tested in a federal court. Support for the challenge in argument is rested upon Albeman v. Booth, 21 How. 506; Tarble's case, 13 Wall. 397; Van Reed v. People's National Bank, 198 U. S. 554, 557; State ex rel. Wilcox v. Curtis, 35 Connecticut, 374. But without inquiring into the merits of the doctrine upon which the proposition rests we think when the contention is tested by a consideration of the subject matter of this particular controversy it cannot be sustained. In other words, we are of opinion that as the particular functions in question by the express terms of the Act of Congress were given only 'when not in contravention of state

> or local law,' the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and **we place our conclusion on that ground."**

Not all the members of the court agreed to this interpretation of the Act of Congress there under consideration; and, for the minority, Mr. Justice Van Devanter said:

> "**The writ of quo warranto was a prerogative writ and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege or power claimed under the United States it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned** (Wallach v. Anderson, 5 Wheat. 291; Territory v. Lockwood, 3 Wall. 236; Newman v. Frizzell, 238 U. S. 537). As is said in the Lockwood case, 'the right to institute such proceedings is inherently in the government of the nation.' This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose, and 'are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit' (Davis v. Elmira Savings Bank, 161 U. S.

275, 283; Van Reed v. People's National Bank, 198 U. S. 554-557). Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them (McClung v. Silliman, 6 Wheat. 598, 605). If it were otherwise the supremacy of the United States and of its Constitution and laws would be seriously imperiled (Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Tennessee v. Davis, 100 U. S. 257; State ex rel. Wilcox v. Curtis, 35 Conn. 374).

"**Thus much, as I understand it, is conceded in this court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress.**"

The effect of that opinion is that the state may proceede in quo warranto against a national bank to define the limits of its charter and restrain it within the limits thereof as so defined, **when, and only when, Congress shall have so authorized.** There is no pretense of such authority in the case in hand.

This is in keeping with what was said in Van Reed v. People's National Bank, 198 U. S. 554, where was dealt with R. S. U. S., Sec. 5242, forbidding attachments and injunctions against national banks in advance of final judgment, the validity and binding force of which on the state courts was there affirmed.

Said Mr. Justice Day (R. 557), who delivered the views of the Court in that case:

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and **are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit.**"

The case of State ex rel. v. Curtis, 35 Conn. 374, was referred to in both opinions here in First National Bank v. Union Trust Company, supra. The opinion in that case is a very satisfactory exposition of this question, and expressly denies the power of the state which is here asserted. It is there said:

> "The power to create a corporation is an attribute of sovereignty; and the Government of the United States created the corporation in question, in the exercise of that independent and supreme sovereign power which the people delegated to it by the Constitution. It is, therefore, the creature of that sovereignty, and amenable to and controllable by it and by none other.
>
> "An information in the nature of a quo warranto against a corporation lies only at the instance and in the name of the sovereign power which created it (5 Wheaton 291). The original

writ so lay against any person who usurps any franchise or liberty against the king, or for misuser or nonuser of franchises or privileges granted by him. The information in the nature of a quo warranto, authorized by the statute of the 9th of Anne, at the relation of any person against any other person usurping, intruding into or unlawfully holding any franchise or office in any corporation, is but an extension of simplification of the ancient writ and is grantable only where that would lie. In England it lies in the name of the sovereign against those who usurp such franchises, because such usurpation is in derogation of the rights of the crown. In this country it lies in the name of the government, against those who usurp such franchises, because **grantable or granted** by the commonwealth.

"'The state or commonwealth,' says Mr. Angell in his Work on Corporation, 'stands in the place of the king and has succeeded to all the prerogatives and franchises proper to a republican government. With us, therefore, to assume a power which cannot be exercised without a grant from a sovereign authority, or to intrude into the office of a private corporation, contrary to the provisions of the statute which creates it, is, in a large sense, to invade the sovereign prerogative and to assume or violate a sovereign franchise.' And the cases cited fully sustain his positions. Upon the same principles the information can lie only in the name of the United States, and in the federal courts, against those who invade a franchise **grantable or granted** by the national government.

"As then the corporation in question is the creature of federal sovereignty, and in respect to its internal organization, operation and continual existence, is amenable to and controlled by that sovereignty alone; and as the writ in question is properly grantable by that sovereignty alone whose franchise has been invaded and violated, it would seem upon principle too clear for argument (if there be nothing more in the case), that the relator has erred in invoking the interference of another uninvaded and unviolated sovereignty, and the court below have erred in assuming jurisdiction and granting the writ.

"Such is the obvious prima facie character of the case before us. But the plaintiff insists that there is no error, and makes several claims, founded upon the complex character of sovereignty as it exists in this country divided between the national and state governments.

"1. He insists in the first place that this institution is amenable to state sovereignty, because it is located and its officers discharge their duties and perform their functions within this state. This claim is groundless.

"It is, indeed, true, in the language of the Supreme Court of the United States (2 Howard 555), that 'a corporation created by a state, to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, is a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled—for the purpose of

suing and being sued—to be deemed a citizen of that state.' But this is not such a corporation. It was not created by us; it does not perform its functions under our authority; and it is the creature of and controllable by another and superior sovereignty. That other sovereignty is exercised over the whole country irrespective of state lines or state authority. It places its officers and agents and instruments wherever its necessities or its interests require, and necessarily within the limits of the states. With those officers, and agents, and instruments, in the exercise of their functions, state authority can in no way interfere. The national banks are its instruments, by which it performs its functions in establishing a national currency; on that fact their constitutionality is placed, and in the exercise of the powers conferred upon them, they are as independent of state control as the army, or navy, or the officers of the subtreasury and custom house, or any other instrumentality by which the functions of the federal government are performed. No other view is compatible with the principles of our own jurisprudence, or those recognized and declared by the Supreme Court of the United States in numerous cases, and particularly in the exhaustive opinion of Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheaton 316.

"2. The relator insists, in the second place, that the Superior Court has jurisdiction of the offense set forth in the information, because the judicial power of the federal and state governments is exercised concurrently by the courts of

either, unless Congress has conferred exclusive jurisdiction, in respect to the subject matter, on the federal courts, and no such exclusive jurisdiction has been conferred in relation to this. This claim is equally unfounded.

"It is undoubtedly true that the state courts retain jurisdiction over some matters, to which, by the Constitution and laws of the United States, jurisdiction is given to the federal government and courts, and in respect to which jurisdiction appertained to and was exercised by the state courts prior to the adoption of that Constitution. On that subject the rule seems to be that the state courts retain the jurisdiction which they had before that event, except where it was taken away by an exclusive constitutional grant of jurisdiction to the federal government; or Congress had made the jurisdiction exclusive in the federal courts; or the exercise of the jurisdiction is repugnant to, and incompatible with, such exercise by those courts.

"But the cases where such concurrent jurisdiction can be entertained by the courts of the state are few. Most of those where such jurisdiction has been sustained by the Supreme Court of the United States, and all to which we have been particularly referred, were cases of a criminal character, where the act was an offense against both sovereignties and punished by a law of the state. Here there could be no jurisdiction anterior to the adoption of the Constitution. Nor has there been any invasion of the sovereignty of this state or violation of its laws, or any offense which the state is called upon to redress in its

own behalf. It is a clear principle that where there has been no offense there can be no judicial jurisdiction, and equally clear that **a state has no authority to enforce a national law in behalf of the national government.**

"And this is one of the class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government. The corporation in question, being the creature and instrument of that government, must necessarily be subject to that alone. By the common law, and by our statute, an information of this character lies as well to deprive a corporation of its charter as to determine the rights of its competing officers; and if the relator is right in this claim, its charter can be taken away and its franchises seized by the courts of the state. Nothing could be more repugnant in character than such an unauthorized interference, for such a purpose or for any purpose.

"3. The plaintiff claims in the third place that concurrent jurisdiction of the subject matter is conferred upon the state court by the Amended Currency Act of 1864, Section 57, which provides 'that suits, actions and proceedings against any association, under this act, may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. Provided, however, that

all proceedings to enjoin the comptroller under this act shall be had in a circuit, district or territorial court of the United States, held in the district in which the association is located.' To this claim also we find it impossible to assent.

"**The information in the nature of a quo warranto, although grantable** to determine a private right to an office in a corporation, between party and party, as well as **to determine the right of the corporation to the franchise assumed,** and a civil proceeding, **must be filed and issued in the name of the sovereignty which created the corporation** and is still so far forth a prerogative writ."

Kindred thereto is the opinion of the Supreme Court of South Carolina in a proceeding by the Attorney-General of that state to remove a presidential elector from office, of which the Court said (State ex rel. v. Bowen, 8. S. C. 400):

"The real point of difficulty in the present case was not noticed by counsel for defendants. It arises out of the general rule governing the right of quo warranto, and therefore applicable to formal proceedings serving as a substitute for that remedy. The present action is brought in the name of the State of South Carolina. Can it be maintained in the name of the state? And if not, does not that circumstance prevent judgment? If so, a further question would arise whether that defect can become available to the

defendants under their plea to the jurisdiction, notwithstanding the objection was not taken by them in form.

"The familiar rule governing proceedings by quo warranto is that only the sovereign from whom the office, franchise or liberty—that is, the subject of controversy — originated, and into whose hands the same, if forfeited, would return, can maintain the remedy or authorize it by the allowance of his name as a means of asserting the title of right of a citizen to the same.

"It is necessary, then, to inquire whether the United States or the state stands in the relation just expressed to the rights in controversy in the present case.

"The question then arises, did the authority claimed to be exercised by the defendants as electors of president and vice-president originate in the constitution and laws of the United States or in those of the state? • • •

"In the present case the United States has created the function, but authorized the state to exercise the power of appointment to fill it.

"The case of a municipal corporation created by the sovereign, who has conferred upon the corporation the power of choosing municipal officers, involves the same general relationship. In the latter case the ouster must take place in the name of the sovereign.

"The act of appointment is one that can be exercised in the hands of a subject, while the act of ouster, through the courts of law, can only be claimed of common right through the sov-

ereign. The existence, therefore, of the former right cannot imply the existence of the latter, for its nature and quality are different.

"In Wallace v. Anderson (1 Wheat. 291) it was held that a writ of quo warranto could not be maintained against an officer of the United States except in the name of the Government of the United States. The same was held in Territory v. Lockwood, 3 Wall. 236.

"It is very clear that if the action in the nature of quo warranto is an appropriate remedy under the claims made in behalf of the individuals who united with the state as plaintiffs, such proceedings should be presented in the name of the United States. It will not be necessary to determine whether an action in the nature of quo warranto can be maintained in the state courts in the name of the United States."

In Harkness v. Guthrie, 27 Utah 248 (75 Pacific 625), was involved the common-law right of a shareholder to inspect the books of a national bank. In distinguishing this right of the shareholder from the sovereign right of visitation, the Utah Court observed:

"In the United States visitorial power over all except private eleemosynary corporations existing under and by virtue of the laws of a state vests in the state, and, as to those formed under an act of Congress, it vests in the general government, and is exercised through the medium of

> the courts, or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in Merrill on Mandamus, Sec. 175, that 'visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings.' "

That case came here, and the views of the Utah Court were approved (Guthrie v. Harkness, 199 U. S. 156). It was held that the common-law right of the shareholder to examine the books of the corporation was one thing; the power of visitation of the sovereign another.

Mr. Justice Day, speaking for the Court, said (199 U. S., l. c. 157-158):

> "We are unable to find any definition of 'visitorial powers' which can be held to include the common-law right of the shareholder to inspect the books of the corporation. 'Visitation' is defined by Bouvier (Dic., Vol. II, p. 1199) as follows:
>
> " 'The act of examining into the affairs of a corporation.
>
> " 'The power of visitation is applicable only to the ecclesiastical and eleemosynary corporations (1 Black. Com. 480). The visitation of civil corporations is by the government itself, through the medium of the courts of justice. (See 2 Kent 240.) **In the United States, the leg-**

islature is the visitor of all corporations founded by it for public purposes (4 Wheat. 518).'

"The origin and nature of 'visitorial' power received full discussion in the case cited by Bouvier from 4 Wheaton. (See opinion of Mr. Justice Story in **Dartmouth College case,** 4 Wheat. 673.)

"The meaning of this section was before Judge Baxter in the case of **First Nat. Bank of Youngstown v. Hughes,** 6 Fed. Rep. 737, and of the meaning of the term 'visitorial powers,' as used in section 5241, that learned judge said:

" 'Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforces an observance of its laws and regulations. Burrill defines the word to mean "inspection; superintendence; direction; regulation." '

"At common law the right of visitation was exercised by the king as to civil corporations and as to eleemosynary ones by the founder or donor (1 Cooley's Blackstone 481). **'In the United States the legislature is the visitor of all corporations created by it,** where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters' (1 Cooley's Blackstone 482, note)."

The other side of the shield is presented by the opinion of the Supreme Court of Ohio in State ex rel. v. Cincinnati etc. Railway Co., 7 Lawyers' Reports

Annotated 319. This was a proceeding in quo warranto against certain railroad companies chartered by the state, for a violation of their charters, by reason of discriminations in interstate commerce. Because of the paramount right of Congress to regulate interstate commerce, the respondents challenged the right of the state to so proceed.

The Ohio Court denied the contention, saying:

> "As the state was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the state or misuses its franchises to oppress the citizens thereof.
>
> "For such offenses the state, acting through its legislature and courts, and in the exercise of a sound discretion, may either destroy the corporation entirely, by forfeiting its charter, or oust it from the wrongful exercise of its powers; and if, instead of, or in addition to, misusing the franchises actually conferred, it usurps others, the circumstance that the usurped franchises relate to and concern commerce between the states ought not to deprive the state of its visitorial power. **If the state creating the corporation is deprived of its power, none exist elsewhere. 'The government creating the corporation can alone institute such a proceeding** (quo warranto to adjudge forfeiture of a corporate franchise), since it may waive a broken condition of a compact made with it' (Angel & A. Corp., Sec. 777, and cases cited. See note 6)."

The opinion of the state court is obscure with respect to the state statutes mentioned in the opinion (R. S. Mo. 1919, Secs. 11684 and 11737). We do not think the Court intended to be understood as holding that these statutes forbid a national banking association doing business in the state to have more than the one office, or place of business. The statutes are part of a system regulating state banks, and, as such, are presumably valid. But in the discussion of the powers of national banking associations or the right of the state to maintain this proceeding, these statutes have no place. The very question dealt with in Osborne v. Bank of United States was whether the state of Ohio might forbid a national bank to have offices in the state without a purchase of the privilege. The inquiry was answered in the negative. Upon the same considerations it must be held beyond the power of the State of Missouri to enlarge, restrict or deny the powers of national banking associations, by statute, for the reason that such powers are drawn from another source.

It was argued at the bar of the state court that if the contention of the plaintiff in error should be allowed, national banking associations might engage in the operation of mercantile or manufacturing establishments, within the boundaries of the state, with no right on the part of the state to interfere.

That is at it may be. The question is not here. The plaintiff in error was chartered by the National Government as a bank; it is engaged only in banking, and proposes to engage only in banking. In other words, it is exercising only the corporate functions conferred upon it by the National Government. In its ultimate analysis, the complaint of the State is merely as to **the extent of the exercise of powers expressly conferred by the United States.** Surely the sovereign which confers the power is the proper authority to control its exercise. As well may it be said that the State might complain, if the postmaster at St. Louis established a branch post office at a place where the State thought there should be none; or if the Collector of Internal Revenue for the district did likewise for the better accommodation of taxpayers.

As said by the Connecticut Court in the case referred to above, a proceeding to inquire into the exercise of powers "**granted or grantable**" by the National Government can be instituted only by that government.

And this in turn is in perfect keeping with the fundamental nature of such a proceeding as one to **return** unto the sovereign a franchise which he has not granted, or which, being granted, has been forfeited.

How can a franchise which can only emanate from the National Government be, by the judgment of whatsoever court, adjudged returned to the State of Missouri?

That the United States might, or may, maintain such a proceeding as here to define the powers of the plaintiff in error, and restrain it within the powers thus defined, goes without saying. (Indeed, at the argument of this case at the bar of the state court it was said by counsel that unsuccessful efforts had been made to procure the Department of Justice to bring **this proceeding**, before the Attorney-General of the state was asked to so proceed.)

That such a proceeding is the exercise of a supreme sovereign power is equally plain. It is not possible for both the state and the general government each to be supreme in the same field. Sovereignty cannot be concurrent, else it is not sovereignty.

Are there those who would contend that the general government might attempt to restrain, within the supposed limits of the legislative grant, corporations created by the state? And if not, what considerations make for the denial of the power in the one case which do not equally apply in the other?

Under our form of government it is fundamentally impossible that supreme sovereign power as to the same subject matter may rest both in the National

Government and that of the state. In the infancy of the republic it was the anxious duty, but high prerogative of this Court to declare these fundamentals with respect to the relations of the national and state governments on the due respect for which the perpetuity of our institutions must depend.

The present necessity of again enforcing them may be of service in this hour of social unrest.

The argument advanced by the state court on the question is specious, but not sound. It is that Congress has not conferred the asserted power upon the bank; its exercise is contrary to the laws of the state, hence the state may interfere to prevent its exercise. **In its ultimate analysis this position is equivalent to the assertion that where, upon judicial authority, it is found that the asserted power has been granted a national bank, only the National Government can conduct the inquiry. But where it has not been granted, the state may intervene.** Under this reasoning, the prosecution of **illfounded** proceedings of this type is the exclusive function of the National Government; those which are **well taken** are among the functions pertaining to the state.

Suppose the general government should, hereafter, institute a similar proceeding to this against the plaintiff in error. Upon what consideration would its undoubted interests in the subject matter be fore-

closed by any judgment which may be herein pronounced? And if the judgment is not to foreclose the question, why pronounce it?

It seems unnecessary to give particular consideration to the abstract question of jurisdiction of the state court. As said by the Supreme Court of South Carolina in State ex rel. v. Bowen, supra, the right of the **National Government** to institute such a proceeding in a court of the state need not be inquired into. The inquiry goes deeper; it concerns the power of the state to exercise sovereign powers pertaining to the Government of the United States. The state court mentioned in this connection R. S. U. S., Sections 5186 and 5198, Act of July 12, 1822, as re-enacted (U. S. Comp. St. 1916, Sec. 9668). These statutes do no more than confer jurisdiction on the proper state courts of ordinary actions between ordinary litigants, to which national banking associations are parties. But they are devoid of any expression of an intention on the part of Congress to surrender the sovereignty of the United States over its own corporations. Particularly is this true in view of the particular provisions of Subdivision 16 of Section 24 of the Judicial Code, specifically providing for jurisdiction in the national courts of such an action as this by the National Government.

But the question seems one of academic interest only. If the state possesses the sovereign power over

national banks, which is here asserted, it certainly has power to designate the court by means of which it will exercise the authority. And, on the other hand, if the state has no sovereignty in the premises, because the same pertains exclusively to the National Government, that is an end of the inquiry in whatsoever court the proceeding may have been undertaken.

It is respectfully, but earnestly insisted that the state is without prerogative here, her Attorney-General without right or duty, and that the state court was in error in ruling otherwise.

II.

Perhaps the kernel of the case as concerns the right of the bank to do what it has undertaken can be best presented by indicating, first, what the information **does not** charge, and then contrasting this with what it **does** charge.

What the Information Does Not Charge.

The information **does not** charge, except as a legal conclusion, that the respondent has established, or intends to establish, branch banks, and it is quite irregular to assume that this proceeding, in substance or effect, involves any feature of **that** question.

(1) Branch banks may be, and usually are, located in a foreign jurisdiction (i. e., some other state) or in some separate political subdivision of the same state—nothing of the kind is charged here.

(2) The creaton of branch banks, doubtless, involves some segregation and apportionment of the capital stock of the parent institution, put at hazard in the operation of the subsidiary—and nothing of the sort is charged here.

(3) The operation of a branch bank necessarily involves the direction and control of the subsidiary institution by independent and local directors and the actual operation of the branch by independent and local officials—and nothing of this nature is charged here.

What the Information Does Charge.

What the information **does charge** is:

(1) That the respondent, being empowered by the national law so to do, had for a long time engaged in the banking business in the City of St. Louis, Missouri, and for several years it had conducted, and is now conducting, its business at a banking house located at Broadway and Locust street in said city (Rec., p. 1);

(2) That lately the respondent had opened another banking house or office (yclept by the State's Attorney-General a "branch bank") at 818 Olive street

in said city, where it also conducted its banking business, whereby it was usurping power denied to and withheld from it by both state and federal laws (Rec., p. 2);

(3) That respondent purposes to open other banking houses or offices (again yclept "branch banks") at various other points in said city (Rec., p. 2).

After other allegations, either legal conclusions (or immaterial in this presentation) a writ of quo warranto is prayed for (Rec., p. 3).

Questions Not Involved Here.

The question whether a national bank, having charter power to do business in a particular city or other political subdivision, may open a banking house, office or branch bank in another state or in another city or political subdivision of the same state does not arise on this record and may safely be left to be determined in some case where it does arise.

Question Involved Here.

The sole question presented by this record, as relates to the merits, is this:

Is a national bank, having charter power to do a banking business in a designated city, limited and restricted to conducting that business at one banking house or office in such city?

Express or Implied Power of National Banks.

The right of the bank to have more than one banking house or office within the city where, by its charter, it is authorized to do business, arises either out of the **express** or the necessarily **implied** powers found granted to such bank—and which is immaterial.

The National Banking Act, after providing that banks may be formed by five or more persons entering into **articles of association,** which shall specify, in general terms, the object of its formation (R. S., Sec. 5133), then provides that the organization certificate shall specifically state, first, the name of the bank, and

"Second. The place where its operations of **discount and deposit** are to be carried on, designating the **state,** territory or district, and the particular county, **city,** town or village" (R. S., Sec. 5136).

This being done, the act then provides that the bank **shall have power** to regulate, by by-laws, "**how its general business** (shall be) conducted and the privileges granted it by law exercised and enjoyed," and "to exercise * * * all such **incidental powers** as shall be **necessary** to carry on the **business of banking,**" etc.

Respondent complied with these requirements designating the **City of St. Louis** as "the **place** where its

operations of discount and deposit were to be carried on" (Rec., p. 1).

The word "place" as used in R. S., Sec. 5190, quoted above, does not mean the **location** within the "county, city, town or village," but means the county, city, town or village **within which** the operations of the bank are to be carried on.

This is not only the **necessary effect of the language** used, but is also the **judicial construction** unwaveringly given to that language.

This Court had occasion to consider the meaning of the words "the place" as used in Section 5190 of the National Banking Act, in the case of McCormick v. Market National Bank, 165 U. S. 538, l. c. 549, where it said:

> "The provision of section 5190 that 'the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate' refers to its 'usual business' after obtaining its certificate from the comptroller; and to **'the place,'** that is, the **city or town, in which,** after it has been authorized by the comptroller's certificate to commence its business of banking, **its office or banking** house is located." (Bold-face type ours.)

Like construction was given to these words by the Supreme Court of Illinois (McCormick v. Market Na-

tional Bank, 162 Ill. 100, l. c. 108), where that Court said:

> "The association is required, in its organization, to state **the place** where its operations of discount and deposit are to be carried on, but by this is meant the **town or city, not the room, street** or **number** in such town or city."

Nothing more appearing, it would clearly be within the respondent's express or incidental or implied powers (and it will be noticed that these, too, are **expressly** granted by the seventh subdivision of R. S. 5136), and the respondent would be clearly entitled to exercise its charter powers at such locations, and at as many locations as it saw fit to exercise them, within the territorial limits of the **place** where it was granted the power to do its business. For certainly the grant of an **unrestricted** power to do business within a designated area is not and cannot be a grant of **restricted** power to do business in that area.

Moreover, treated as a mere incidental or implied power, it is quite certain that a bank has quite as full measure of implied powers, restricted to the objects for which it is formed, as has any other corporation, restricted to the objects for which it is formed.

Implied powers include not merely what is **strictly necessary**, but whatever, not being expressly prohib-

ited, may "fairly be regarded as **incidental** to the objects for which the corporation is created."

Green Bay v. Steamboat Co., 107 U. S. 98, 100.

An implied power is one that is "**needful, suitable** and **proper** to accomplish the **object of the grant,** and one that is directly and immediately **appropriate to the execution of the specific powers**" granted.

People v. Pullman P. C. Co., 175 Ill. 125, 136.

A power which is obviously **appropriate and convenient** to carry into effect the franchise granted has always been deemed a **necessary** one."

State v. Hancock, 35 N. J. L. R. 537, 545.

Tested by these rules, it needs no argument to show that in a large city several officers or banking houses are, or may be, "needful," "proper," "appropriate," "covenient" and even strictly "necessary" and essential to the full exercise of the powers expressly granted.

The legislative purpose in authorizing the creation of national banks, as it relates to the general public, is to afford, through national banks, banking facilities to the community of the place where the bank is authorized to operate.

The legislative purpose, as relates to the bank, is to permit it to serve, and thereby secure custom and profit, from as many of the community within the designated area as see fit to become its patrons.

Both of these purposes (i. e., as relates to the public and as relates to the bank) are best accomplished if the facilities for dealing between the bank and the public are increased, and not restricted. Plainly, additional banking houses or offices located in the several business centers, usual in all large cities, mean, necessarily, increased opportunity to the business interests located in these several business centers to do their banking business at such additional banking houses or offices; and thereby the public purposes in the legislative mind is better accomplished; and, in turn, as this means increased custom for the bank, it necessarily follows that the private purpose in the legislative mind (as relates to the bank itself) is also better accomplished.

In Gas and Fuel Co. v. Dairy Co., 60 Ohio State Reports 96, 104, the Court said:

> "These implied powers which a corporation has in order to carry into effect its legitimate purposes are not limited to such as are indispensable to their accomplishment, but comprise all those powers that are necessary in the sense of appropriate, convenient and suitable, including a right of reasonable choice of means to be

employed; and whether an act comes within those powers, must be determined in each case from all its facts and circumstances."

In Union Bank v. Jacobs, 25 Humph. (Tenn.) 515, 525, it was said:

> "A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to **any means** that would be necessary and proper **for an individual** in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing."

In Barry v. Merchants' Exchange Company, 1 Sandf. Ch. (N. Y.) 280, 289, it was said:

> "But corporations are usually created for some limited and specific purpose, and therefore the general powers incident to a body corporate at common law are restricted by the nature and object of the institution of each. And every such corporation has power to make all contracts which are necessary and **usual** in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law, or the provisions of its charter.
>
> "Upon this principle, and to the extent stated, a corporation in order to attain its legitimate objects, **may deal precisely as an individual may** who seeks to accomplish the same end."

In Willmarth v. Crawford, 10 Wend. (N. Y.) 341, 342, it was said:

> "Corporations, while acting within the scope of their authority under the act creating them, that is, in the execution of the powers granted to or duties imposed upon them by the charter, are to **this extent and end like natural persons**; and this view may frequently determine the lawfulness or unlawfulness of their acts, and the remedies which exist for and against them. Indeed, the whole effect of a charter oftentimes is only to invest the individuals composing the corporation in the aggregate with powers in reference to a specified object, which each member in his natural capacity already possesses; the charter in question is an instance of the kind. There are many others where privileges are granted not belonging to individuals. **The tendency of modern decisions has been to assimilate the actions of corporate bodies**, within their sphere, to those of **natural persons**, and to determine their rights and their liabilities, and apply remedies for and against them, upon principles applicable to the latter."

And in Wright et al. v. Hughes et al., 119 Ind. Rep. 324, 328, the Court said:

> "Accordingly it may be regarded as settled that where general authority is given a corporation to **engage in business**, and there are no spe-

cial restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories."

See, also, Legrand v. The Manhattan Mercantile Association, 80 N. Y. Rep. 638; Brown v. Winnisimmet Company, 11 Allen Reports 326; Nebraska v. First National Bank, 88 Fed. Rep. 947; First National Bank v. Ocean National Bank, 60 N. Y. Rep. 278; First National Bank v. Harris, 108 Mass. 514; Straus and Brother v. Eagle Insurance Company, 5 Ohio State Report 59; Hood v. New York & New Haven Railroad Co., 22 Conn. Rep. 1, 16; The Banks v. Poitiaux, 3 Rand (Va.) 136.

That corporations generally (disregarding, for the nonce, any reference, express or implied, to banking institutions) usually (and one may almost say naturally) exercise their granted powers at several, and frequently numerous, locations needs no argument. One has but to open his eyes and see, or close his eyes and think of, the very numerous branch offices through which corporate powers are exercised by nearly every business activity in which corporations are permitted to engage.

If this is one of the "needful," "convenient" or "appropriate" means, and, therefore, one of the implied or incidental powers by which an ordinary corporation may exercise its express powers, it is diffi-

cult to conceive of any **reason** why a banking institution should not have like incidental and implied **powers.**

The gist of all the law on the subject of implied powers is this: If the manner or method availed of is, or may be, **helpful** in accomplishing the express power granted, then the corporation may resort to this manner or method, unless there is express inhibition. No such inhibition is claimed or found here.

The **demonstration** that the power to create additional banking houses or offices within the city where it is authorized to do business will be, or may be, **helpful** to a national bank lies in the fact that like additional banking houses or offices **have proven helpful** both to state and national banks.

It is a matter of general knowledge, of which courts take judicial notice, that branch offices or banking houses do exist in most if not all of the larger cities.

Some of these exist, perhaps, under express statutory grant of the power, some under the implied power; some are state banks—some are national banks.

Here, in the City of Washington, there are three banking rooms, branch offices of the Riggs National Bank, in three different localities. The Chatham & Phoenix National Bank has nine such offices, the Me-

chanics & Metals 12, the Chase National, the Public National 5, in New York City. The Calcasieu National Bank at Lake Charles, Louisiana, has 8.

According to the records of the comptroller's office national banks operating such offices exist in fifteen different states.

What is so universally availed of must necessarily have proven **helpful**, and if helpful in the execution of **express powers** is within the **implied powers**, unless prohibited.

Has Congress Inhibited the Establishment of Additional Banking Houses or Offices?

Although the right to do what is here sought to be suppressed (i. e., the right to establish additional banking houses or offices within the area designated by the charter) is within the implied and incidental powers of the bank, it is, of course, conceded that Congress **might have inhibited the exercise of this power.**

This brings us to the question:

Has Congress enacted any inhibition?

The Attorney-General of the State of Missouri says it has.

The respondent says it has not.

This inhibition, it is asserted, is found in R. S. Sec. 5190.

That section reads:

> "The usual business of each national bank **shall** be transacted at **an** office or banking house located in the **place** specified in its organization certificate."

Having in mind that the words "the place" mean the territorial area **within which** the bank is authorized to do its business, and not a designated lot or building located in such area, the question that arises for construction under Section 5134 is this:

Is that section a **limitation** or a **command?**

Does that section place a **limitation** upon the **manner or method** or the **number of offices** in which the granted charter powers shall be exercised, or does it **command** that they shall be exercised in a place of business, i. e., "an office of banking house," as contradistinguished from the "curb" or somebody's kitchen?

(a) It is to be noted, in the first place, that R. S. Section 5190 is a part of that subdivision of the federal statutes which has to do with the "regulation" of national banks.

Ordinarily, regulatory statutes are not intended to **delimit** the powers granted by existing statutes vesting organic powers.

By the existing statutes (R. S. 5133, et seq.) a national bank is given the right to do a **banking**

business **within** the designated city, town or village. The exercise of this charter power is not by these sections limited to **one or any number** of locations within such city, town or village.

(b) The natural reading, and the manifest purpose of R. S., Sec. 5190, is that the bank shall have "an office or banking house" located in the "place," i. e., "**business place**" in city, town or village, designated in its organization certificate—not that it shall have "but an office" or "only one office." These would have been the chosen words if **limitation** had been the legislative purpose. And there being **no limitation**, the bank may have as many offices as it deems **needful.**

The statute **commands** that the bank **shall** maintain **an** office or banking house, and **permits**, because it does not restrict the establishment of **as many as the bank sees fit to have.**

The purpose of the **command** is that there shall be **at least** one place of business where those who want to transact business with it may do so—where the State's Attorney-General, as he saw fit to do in this case, may serve it with process—where the Attorney-General of the United States, if he saw fit, as he did not see fit in this case, may do likewise—where anyone who has any business with the bank may seek it out and transact that business—that it shall exercise the granted powers at a **place of business** (office

or banking house), and not under somebody's hat or hoopskirt.

The statute is little more than the familiar statute, common to most, if not all the states, concerning both foreign and domestic corporations that they shall, in the place where it is organized, in the case of domestic corporations, or where its principal place of business is located in the foreign state, maintain an office where process may be served upon it.

It is a **command** that it **shall have** at least **an office,** but not an **inhibition** against its having **more than one** or **as many as it likes.**

Whoever heard of any corporation on earth being restricted, by statute, to doing business at one location in a restricted territorial area?

What would be the **purpose** of any such provision?

Who, before this proceeding began, ever suggested that any **useful purpose** would be subserved by any such inhibition?

What, but **apprehension of competitors** would suggest it now?

But, **if suggested,** would any Legislature, much less the National Legislature, signify its approval of the suggestion by a weak-kneed enactment **labeled** "regulation," which does not purport to **inhibit,** which does not use the word "inhibition" or "prohibition" or any equivalent term anywhere.

The Congress of the United States is no "speak easy" institution.

It is not accustomed to express itself on bended knee with bated breath. Rather, it speaks trumpet-tongued—that all who are not blind, deaf and daft may hear and know.

To say that Congress, by this section, intended to **inhibit anything** is to confess utter unfamiliarity with the manner in which Congress speaks.

It is to **torture** the statute to a meaning which the Congress never intended it should have.

(c) The Attorney-General for Missouri will, however, contend that R. S. Section 5190 was intended to and does limit a national bank to **one** office or banking house at which it may exercise its charter powers, notwithstanding the provisions of R. S. Sec. 5133, et seq., which provide that the bank may exercise its charter powers within—that is to say, **throughout** —the designated city, town or village.

The only way in which R. S. 5190 can be tortured into a **limitation**, and not of **regulation**, of the charter powers granted by the previous sections is to construe the article "an" (the equivalent of the article "a") **as a word of limitation.**

But this would be entirely contrary to all previously decided law on this subject.

The indefinite article "a" or "an" is not usually a word of limitation.

> "As by its derivation, so also in meaning, **an or a is a weaker or less distinct one.**
>
> "Usually, as the indefinite article proper, it points out, in a loose way, as **one** of a **class** containing **more** of the **same kind**" (Century Dictionary).

The Constitution of Arkansas provides that for each circuit "**a judge shall be elected.**"

The Arkansas Legislature passed an act providing for "an additional judge" for the Sixth Circuit.

The Attorney-General of Arkansas filed quo warranto, alleging that the act was unconstitutional, and contended that the letter "a" before the word "judge" in the Constitution was "a limitation upon the power of the Legislature to provide for more than one judge in a judicial circuit."

The Court, in refusing the writ, said (State ex. rel. v. Martin, 60 Ark. 343, 28 L. R. A. 153):

> "Now, the adjective 'a,' commonly called the 'indefinite article,' and so called, too, because it **does not define any particular person or thing,** is entirely too indefinite, in the connection used, to define **or limit the number** of judges which the legislative wisdom may provide for the judicial circuits of the state. And it is perfectly obvious that its office and meaning were well understood

by the framers of our constitution, for nowhere in that instrument do we find it used as a **numerical limitation.** * * * According to Mr. Webster 'a' means 'one' **or** 'any,' but less 'emphatically than either.' It may mean one where only one is intended. That is the trouble. **Of itself it is in no sense a word of limitation.** * * * The Constitution requires 'a judge' for each circuit, and there must be **AT LEAST ONE JUDGE. But where is the limitation** upon the legislature to provide for more if the necessity arises. * * ***

This Court has said:

"The general rule is that 'words importing the singular number may extend to and be applied to **several** persons or things; words importing the plural number may include the singular' as provided in U. S. Rev. Stats., Sec. 1."

U. S. v. Oregon & C. R. Co., 164 U. S. 526.

The Supreme Court of Massachusetts says:

"The article 'a' is not necessarily a singular term. It is often used in the sense of 'any' and is then applied to more than one individual **object.**"

National Union Bank v. Copeland, 171 Mass. 257, 4 N. E. 794.

See

Thompson v. Association, 8 Common Bench Reports, 848;
European Cent. R. Co. v. Westall, 6 Best & Smith 970.

If the article "an" in R. S., Section 5190, is not a word of limitation, and all the authorities say it is not, then a national bank is not inhibited from establishing as many locations as it chooses for doing business in the designated territory, for there is no other statute under which it is claimed there is any restriction on its powers.

Departmental Construction.

It will be urged that the construction given by the "Department" should control this Court's opinion on the question presented.

The doctrine of "departmental construction," always dangerous, is never applied except where the claimed construction is of long standing, is uniform, and has become a "settled practice."

Merritt v. Cameron, 137 U. S., l. c. 551;
U. S. v. Healey, 160 U. S. 136;
U. S. v. Philbrick, 120 U. S. 52.

In Merritt v. Cameron, 137 U. S., l. c. 551, 552, Mr. Justice Lamar said:

> "A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the treasury department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision."

In Chicago etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, l. c. 100, in construing a section of the Cummins Amendment to the Interstate Commerce Act contrary to an alleged contemporaneous construction by the Department and Congress, Mr. Justice Holmes said:

> "It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy

of the later Act of August 9, 1916, c. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words.''

In cases where this rule was applied, the departmental construction was of long standing and acts had been done or rights had accrued under such construction, so that it would have been unjust or demoralizing to overturn the construction considered by the public as correct and settled.

U. S. v. Alabama Great Southern Ry. Co., 142 U. S. 615;
U. S. v. Finnell, 185 U. S. 236;
Swift Co. v. U. S., 105 U. S. 691.

In Studebaker v. Perry, 184 U. S., l. c. 268-269, Mr. Justice Shiras said:

''It is finally argued on behalf of the plaintiff in error that the doctrine of contemporaneous and practical construction put upon a statute by executive officers is applicable. **It is said that former Comptrollers of the Currency held, in several instances, that the power to assess under the national banking law was exhausted by a single exercise; that subsequent comptrollers ought not to have departed from that construction, and it is urged that this court should, by its decision in this case, set aside the construction at present prevailing and restore the former one.**

''The doctrine invoked is a useful one, but its

application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance."

In this case what department has ever, as its settled practice, denied the national banks the privilege of establishing branch offices or banking houses within the territorial area designated in the charters?

In 1910 application to establish such an office was made by the Lowry National Bank of Atlanta, Georgia.

There was apparently no **"settled practice"** of the Treasury Department at that time, for the question was, on January 3, 1911, referred by the Secretary of the Treasury to the Attorney-General for an opinion.

An opinion was written by the then special assistant to the Attorney-General, Mr. Wrisley Brown, sustaining the right to establish such branch offices.

Quite the contrary opinion was written by the then Assistant Attorney-General, Honorable J. A. Fowler, some time later approved by the then Attorney-General (29 Op. Atty. Gen'l 81).

So that this so-called "departmental construction" —which is construction by a course of acts, which acts indicate **administrative interpretation** long acquiesced in—is not departmental construction at all.

It shows nothing more and nothing less than a doubtful legal question concerning which the Treasury Department refused to determine or foreclose by its acts or otherwise, and concerning which it sought the advice and opinion of the government's Legal Department, the officials of which, in turn, found the question one concerning which they could not agree, and two divergent opinions are on file, to one of which, that adverse to our contention, it is true, is formally given by the head of the Legal Department.

But even so, the Attorney-General's opinion in no nense forecloses the reinvestigation by this Court. His opinion, and any action taken by the department pursuant to it, does not amount to "departmental construction" to which this Court should give any heed.

Moreover, the entire departmental action is based on one isolated instance in which the right now in question was claimed. The only occasion, so far as anyone knows, when the Treasury Department was ever called to act or opine was in the case of the application of the Lowry National Bank, referred to in the opion of the Attorney-General's office.

There is here no basis for a claim of "uniform construction." There can be no uniform construction as to a matter which has only been construed once.

Again, in the very opinion rendered by Mr. Fowler and approved by the Attorney-General, it is expressly

stated "so far as the courts are concerned, the precise meaning of this section is an open one" (29 Op. Att'y Gen'l 94).

Finally, the so-called "departmental construction" contended for is neither persuasive nor to be relied upon in this case because the alleged opinions were not in furtherance of any legal duty. They amounted to no more than private opinions on academic subjects. If a national bank has a right to have branch offices, it has that right by virtue of its charter, irrespective of any superintending control vested in the comptroller of the currency. It has been held that where a departmental officer has no legal authority or jurisdiction to place a construction upon the statute, his action in construing said statute is without force.

State v. Mutual Life Ins. Co., 175 Ind. 59, 93 N. E., l. c. 221;
Schuyler v. Southern Pacific Co., 109 Pac. (Utah) 458.

Furthermore, the authorities, including the Supreme Court of the United States, recognize the foregoing limitation, for in stating the general rule it is said that the construction placed upon a statute by departmental officers **"in the execution or administration"** of such statute will be considered by the courts in construing it.

Legislative Construction.

It will be claimed that because the Congress has, by three enactments, provided for **branch banks** in special and particular instances, or under special and particular conditions, this constitutes such **legislative construction** in denial of the right to have additional offices under the general statutes which is to control the judgment of the Court.

One instance of such special enabling statute is found in Section 7 of the Act of March 3, 1865, ch. 78 (13 Stat. 484, Sec. 5155, R. S.), enacted some nine months after the passage of the original National Bank Act (1864), by which a bank organized under a state law and having branch banks may become a national bank and retain its branch banks.

Concerning which we have this to say:

Congress was here dealing with state banks having branch banks outside of its territorial domicile—branch banks as such and as contradistinguished from additional offices or banking rooms within the territorial domicile of the bank, and what it then enacted as to these has naught to do with the question in judgment here, whether national banks may have **additional** banking houses or offices **within** the territorial area designated in its charter.

The state banks, seeking reincorporation as national banks, had, under their state charters, the

power to establish branch banks anywhere in the state and were not confined to a designated city, town or village.

The National Bank Act restricted the usual operation of national banks to the designated city, town or village.

The state banks, seeking reincorporation as national banks, sought and obtained congressional sanction for the continuance of existing branches.

The legislation sought and obtained was special and designed to secure extended powers for particular institutions peculiarly situated.

Branch banks, as such, are not an unusual incident to banking; they have been frequently expressly authorized and as frequently sustained as impliedly authorized; they have never been expressly prohibited by Congress, and that in the special legislation enacted in 1864 to permit state banks to convert themselves into national banks no thought was given, or should be assumed to have been given, to the powers under the general statutes of national banks, not previously organized as state banks; for the subject-matter then before the legislative minds was state banks seeking reincorporation as national banks, and not national banks, organized as such ab initio. What Congress enacted as to the former bore no necessary or proper relation to the powers of the latter, and to contend that an enabling act as to the former in any

way amounted to a legislative construction of existing laws as to the latter, is to say that Congress then had in mind, considered and construed the laws of a previous Congress pertaining to an entirely different subject-matter. To so assume is to disregard what is common knowledge as to congressional action and to base an argument on fancy, contrary to fact.

Another instance of subsequent legislation claimed to be legislative construction controlling this Court is that with respect to the St. Louis World's Fair enacted in 1901 (31 Stat., p. 1444, Sec. 21), which is another instance of special legislation for a particular purpose.

If this legislation was necessary in order **to meet and overcome the Department's then ruling,** based on the opinion of the Attorney-General that there could be neither branch banks outside of the designated domicile, nor additional offices or banking houses within the domicile, of course, such legislation is in no sense construction of previous legislation. Congress was not then itself construing the existing law; it was meeting and avoiding the construction of the Attorney-General.

The opposite contention comes to this: That the **express grant** of power to operate national banks in a special emergency in 1901 is a legislative declaration that the **implied powers** granted to national

banks in 1864 did not include the power to have more than one office or banking house at its designated domicile. Special and private legislation should not, in our judgment, ever be held to be legislative construction of general laws.

The legislation then enacted concerning branch banks on the Fair Grounds was a mere incident to the legislation in aid of the World's Fair. **Incidentally,** and in aid of the main project, the establishment of branch banks on the Fair Grounds was authorized. Clearly, such incidental provision should not be held to have involved such full consideration of the National Banking Act enacted in 1864 as to justify the assumption that Congress was then indulging in legislative construction of what was done by the Congress of a previous generation.

(c) Again, this legislation (31 Stats., p. 1444, Sec. 21) permitted any national bank in the City of St. Louis **or** the **State of Missouri** to conduct a national bank on the World's Fair Grounds, which were located partly in and partly outside of the City of St. Louis.

So that this legislation necessarily contemplated the maintenance of branch banks outside of the designated domicile of the parent bank.

Permitting, as it did, branch banks **outside** of the national bank's designated domicile, this legislation

can have no possible bearing on the question brought to the bar here, which is whether a national bank may have additional offices or banking houses within its designated domicile.

The other instance of like legislation is that concerning the Chicago World's Fair (27 Stat., p. 33), in which like authority in the same terms, mutatis mutandis, as is the legislation concerning the St. Louis World's Fair.

As to both the St. Louis and the Chicago World's Fairs, it is well to point out that they were operated by a commission provided for by acts of Congress. Unless the powers granted to these commissioners included the power to establish a bank or permit the operation of a branch bank on the World's Fair Grounds, there would have been no bank.

The act was intended to vest power in the commissioners, and not to enlarge or diminish the power of national banks, and so should not be held to constitute legislative construction of the National Bank Act.

State Laws.

It will, doubtless, be conceded that national banks, being corporate entities, created by national law, pursuant to the powers delegated to the national government by the Constitution, are subject to the paramount authority of the United States.

Having undertaken to exercise the power thus granted by the Constitution, it would seem clear that only the national government can regulate, enlarge or diminish the powers granted to its creatures to execute pro tanto the powers granted to the government.

And yet it is contended in this case that the statute of the **state** denying to state banks the right to establish branch banks includes national banks, and that, because a state bank in Missouri may not have **branch banks** located **outside** of its designated domicile, therefore a national bank may not have additional offices or banking houses **within** its domicile.

The statute of Missouri (Sec. 11737, R. S. Mo. 1919) does not even, in terms or by judicial construction, preclude even a state bank from having additional offices or banking houses **within its domicile**, and yet it is claimed that the state statute does just this with respect to national banks—concerning which the state has **no power to legislate** and **has not assumed to legislate.**

The Reason of the Thing.

No **good reason** has ever been suggested why any bank, state or national, should not have **two or more offices or banking houses.**

Yet, it is contended that Congress, although concededly there is no good reason therefore, has **im-**

pliedly done what concededly it never **expressly** did, i. e., it has **impliedly prohibited** additional offices when it **expressly** commanded that it should have "a" **office.**

Prohibition by implication is the somewhat novel proposition on which the state case **rests.**

We submit:

First. That without a good reason Congress should not, would not and did not, enact any prohibition in this instance.

Second. That if it has intended to do so it would have done in good, plain English—in words of one syllable—and would not have left it to this Court to spell out such prohibition by the very uncertain process of judicial construction.

Third. That as there is no **reason** for the prohibition and no **language** of prohibition there should be no **judgment** of prohibition.

Upon which considerations it is respectfully submitted that the judgment of the state court is erroneous, and should be reversed.

JAMES C. JONES,
FRANK H. SULLIVAN,
For Plaintiff in Error.

Jones, Hocker, Sullivan & Angert,
506 Olive St., St. Louis, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS,
Plaintiff in Error (and Petitioner in Certiorari),
vs.
STATE OF MISSOURI, upon information of JESSE W. BARRETT, Attorney-General,
Defendant in Error (and Respondent in Certiorari).

No. 252.

SUBSTITUTED BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FRANK B. KELLOGG,
JAMES C. JONES,
FRANK H. SULLIVAN,
For Plaintiff in Error.

JONES, HOCKER, SULLIVAN & ANGERT,
506 Olive Street, St. Louis, Mo.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Main 1819, Central 919.

EXPLANATORY NOTE.

This brief and argument is intended as in substitution for the original brief and argument for plaintiff in error, filed at the October Term, 1922, and is offered because of the haste with which the former was prepared, by reason of the advancement of the case.

INDEX.

Authorities Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

FIRST NATIONAL BANK IN ST. LOUIS, *Plaintiff in Error (and Petitioner in Certiorari),* vs. **STATE OF MISSOURI, upon information of JESSE W. BARRETT, Attorney-General,** *Defendant in Error (and Respondent in Certiorari).*	**No. 252.**

SUBSTITUTED BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

The Attorney-General of the State of Missouri filed in the Supreme Court of that state an information in *quo warranto* (Rec., pp. 1-3), wherein it was alleged: That the plaintiff in error was a banking association organized under the laws of the United States; that

by its articles of association and certificate of incorporation the City of St. Louis, in Missouri, was designated as its place of business; that for a number of years it had conducted its banking business at a designated building in that city; that it had recently opened a branch office at another place within the city for the transaction of its banking business and contemplated and intended to establish still other such branches in the city; and that the plaintiff in error was without authority of law to have or maintain branch offices for the conduct of its banking business within the City of St. Louis. The prayer was that the plaintiff in error be ousted of the asserted right.

Upon this showing an order to show cause issued (Rec., p. 4). On the prayer of the informant (Rec., p. 3) a temporary injunction issued (Rec., p. 4), restraining plaintiff in error from going forward with its plans to establish branch offices, pending the cause. The plaintiff in error seasonably, but unsuccessfully, asked the dissolution of this injunction as having been obtained in violation of the Revised Statutes of the United States, Section 5242 (Comp. St. 1916, Sec. 9834).

The plaintiff in error also filed its motion (Rec., p. 6) to dismiss the proceeding on the ground that the state and her Attorney-General did not possess the power of visitation attempted to be exercised.

It also submitted a demurrer (Rec., p. 6) in which it contended that the information stated no facts justifying the proceeding; that the Court was without jurisdiction thereof, and that the proceeding was one which only the Government of the United States could maintain.

In due course, and on March 3, 1923, the Court delivered its opinion (Rec., pp. 8-16) and pronounced its judgment (Rec., p. 7) ousting the plaintiff in error of the power and privilege of possessing and operating branch banking houses.

In apt time (Rec., pp. 17 *et seq.*) the plaintiff in error sued out its writ of error here, and, in doubt as to the proper method of review, has also applied for a writ of certiorari, which application has been docketed, and ordered to be submitted with the writ of error.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Missouri erred in holding that it lay within the province of the State of Missouri or the Attorney-General of the state to maintain such a proceeding as this to define the powers of a national banking association, and to restrain such an institution within the powers as thus defined (Assignment of Errors Nos. III, IV, VII, VIII, Rec., p. 18; Petition for Certiorari, pp. 6, 7 and 8).

II.

The Supreme Court of the State of Missouri erred in denying the contention of the plaintiff in error that, the plaintiff in error being a national banking association organized under the laws of the United States, the powers asserted by it being those granted or grantable only by the United States, for that reason it was not within the sovereign authority of the State of Missouri to define the powers of the plaintiff in error under its charter or to restrain it in the exercise thereof (Assignments of Error Nos. V, VI and VII, Rec., p. 18; Petition for Certiorari, pp. 8 and 9).

III.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that the proceeding here involved was one of which the Government of the United States has sole and exclusive sovereignty and power; and that, therefore, the state and her Attorney-General were without power or authority to institute or maintain such a proceeding (Assignments of Error V, VI and VII, Rec., p. 18; Petition for Certiorari, pp. 8 and 9).

IV.

The Supreme Court of Missouri erred in denying the contention of the plaintiff in error that neither the State of Missouri nor the Attorney-General thereof had power or authority to question the right of the plaintiff in error under the laws of the United States to establish and operate branches of its banking business in the City of St. Louis, State of Missouri (Assignment of Error No. VIII, Rec., p. 18; Petition for Certiorari, p. 8).

V.

The Supreme Court of Missouri erred in denying the contention of the petitioner that Sections 11,684 and 11,737 of the Revised Statutes of Missouri of 1919, if interpreted to restrict the powers of national

banking associations in the matter of branch offices or banks, are unconstitutional and void because dealing with a matter within the exclusive province of the Federal Government (Assignment of Error No. X, Petition for Certiorari, p. 9).

VI.

The Supreme Court of Missouri erred in holding and determining that acts of Congress conferring jurisdiction upon state courts over actions against national banking associations (Judicial Code, Section 24, Subdivision 16; R. S. U. S., Sections 5136, 5138, and Act of July 12, 1882, found in Compiled Statutes 1916, Section 9668) conferred authority upon the state, and jurisdiction upon her courts to proceed as here in the exercise of a sovereign power, which is the sole prerogative of the National Government (Assignment of Error II, Rec., p. 18; Petition for Certiorari, p. 6).

VII.

Under its charter and the acts of Congress relating to national banking associations, the plaintiff in error is possessed of power to establish and maintain branch offices in the City of St. Louis for the conduct of its banking business; and the Supreme Court of Missouri is in error in ruling to the contrary (Assignment of Error IX, Rec., p. 18; Petition for Certiorari, p. 8).

STATE STATUTES

REFERRED TO BY THE MISSOURI SUPREME COURT (Rec., p. 15).

Revised Statutes of Missouri of 1919, Article I of Chapter 108, providing for the establishment of a state banking department:

"Sec. 11684. *Prohibition of banking business.* —No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a trans-Atlantic steamship company, or a telegraph or telephone company, possess the power of receiving money for transmission or of transmitting the same, by draft, traveler's check, money order or otherwise (Laws 1915, p. 108)."

Article II of Chapter 108, providing for the incorporation of banks:

"Sec. 11737. *Rights and powers.*—Every such corporation shall be authorized and empowered:

"1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also by buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest: *Provided, however, that no bank shall maintain in this state a branch bank or receive deposits or pay checks except in its own banking house.*"

BRIEF.

I.

The state is without power to bring proceedings to question compliance by a national bank with its charter.

(a) National banks are instrumentalities of the National Government.

McCulloch v. Maryland, 4 Wheat. 318;
First National Bank v. California, Ms. Op. June 4, 1923, No. 276, October Term, 1922.

(b) A proceeding of this kind is the prerogative of the sovereign which created the corporation.

Ames v. Kansas, 111 U. S. 460;
Territory v. Lockwood, 3 Wall. 238;
McClung v. Silliman, 6 Wheat. 303;
First National Bank v. Union Trust Co., 244 U. S. 427;
Van Reed v. People's National Bank, 198 U. S. 554;
Massachusetts v. Mellon, Ms. Op. June 4, 1923 (No. 24 Original October Term, 1922);
Terrett v. Taylor, 6 Cranch. 51;
California v. Pacific Railroad, 127 U. S. 1;
Hale v. Henkel, 201 U. S. 43;

McCulloch v. Maryland, 4 Wheat. 316;
Osborn v. United States Bank, 9 Wheat. 738;
Farmers' Bank v. Minnesota, 232 U. S. 508.

(c) The proper relations between our dual governments make it impossible that a state should possess such power.

Authorities, *supra*;
Ableman v. Booth, 21 How. 518;
Tarble's Case, 13 Wall. 405;
Tennessee v. Davis, 100 U. S. 257.

(d) The enforcement of charter limitations on national banks is denied to citizens because it is the function of the National Government.

National Bank v. Matthews, 98 U. S. 621;
National Bank v. Whitney, 103 U. S. 99;
Reynolds v. National Bank, 112 U. S. 405.

(e) Such a power cannot exist in the states without a sacrifice of the uniformity which was one of the purposes of the National Bank Act.

Easton v. Iowa, 188 U. S. 220.

(f) The Congress, in conferring jurisdiction on courts of the states over actions against national banks, have reserved actions of this type to the Gen-

eral Government, and jurisdiction thereof to the national courts.

12 St. L. 680, Ch. 58, Sec. 55;
13 St. L. 116, Ch. 106, Sec. 56;
Judicial Code, Sec. 24, Sub. 16;
18 St. L. 320, Ch. 80, Sec. 300 B;
22 St. L. 163, Ch. 290, Sec. 4;
24 St. L. 554, Ch. 373, Sec. 4.

(g) State courts have denied the power here under consideration.

State *ex rel.* v. Curtis, 35 Conn. 374;
State *ex rel.* v. Bowen, 8 S. C. 400;
Harkness v. Guthrie, 27 Utah 248, affirmed here, *sub. nom* Guthrie v. Harkness, 199 U. S. 157;
State *ex rel.* v. Railway Co., 7 L. R. A. 319.

II.

A state statute attempting to limit or define the powers of a national bank is invalid.

(a) It is only general legislation of the state which is binding on national banks.

National Bank v. Commonwealth, 9 Wall. 353;
Davis v. Elmira Savings Bank, 161 U. S. 275;
McClellan v. Chipman, 164 U. S. 347;
First National Bank v. California, Ms. Op. No. 276, October Term, 1922.

(b) The Congress, having defined the powers of the bank, have, in so doing, by implication, excluded those not conferred, and hence occupied the entire field of legislation on that subject.

Thomas v. Railroad Co., 101 U. S. 71;
Penn. Co. v. Railway Co., 118 U. S. 291;
Central Transportation Co. v. Pullman Co., 139 U. S. 24;
First National Bank v. National Exchange Bank, 92 U. S. 122.

(c) State legislation, in definition of the powers of a national bank, necessarily conflicts with the regulations, express or implied, prescribed by the Congress.

Easton v. Iowa, 188 U. S. 220;
Farmers Bank v. Dearing, 91 U. S. 29;
California Bank v. Kennedy, 167 U. S. 362;
First National Bank v. California, *supra.*

(d) State statutes defining the manner in which national banks shall exercise their franchises enjoyed from the General Government are invalid because the sovereignty of the state does not so far extend to them.

McCulloch v. Maryland, *supra*;
Osborne v. United States Bank, *supra.*

(e) Such a statute is the exercise of visitorial power which pertains exclusively to the Congress, and which

the Congress have, in terms, forbidden to state legislatures.

Guthrie v. Harkness, 199 U. S. 157;
R. S., Sec. 5241;
38 St. L. (Part I) 272, Ch. 6, Sec. 21.

III.

The bank, in the exercise of its corporate functions, is not limited to a single building in the city in which it does business.

(a) Banking is a natural right, not a privilege.

Bank of Augusta v. Earle, 13 Pet. 517;
Bank of California v. San Francisco, 142 Cal. 276;
Curtiss v. Leavitt, 15 N. Y. 9.

(b) Except as restrained by the Legislature, a corporation may conduct its business at any point within the jurisdiction of the sovereign which gives it being.

Fletcher on Corporations, Vol. 2, Ch. 21, Sec. 806, and cases cited;
Lloyd's Trustees v. Lynchburg, 113 Va. 627.

(c) The function here in question is within the incidental powers of a national bank unless forbidden by the Congress.

First National Bank v. National Exchange Bank, 92 U. S. 122;
Green Bay Co. v. Union etc. Co., 107 U. S. 98.

(d) R. S., Sec. 5136, deals only with the city, town or village designated in the charter, and not with a place of business within the city, town or village.

McCormick v. Market National Bank, 162 Ill. 108 (s. c.), 165 U. S. 538.

(e) R. S., Sec. 5190, does not limit a national bank to a single office for the transaction of its business.

Merchants National Bank v. State National Bank, 10 Wall. 604;
R. S. U. S., Sec. 5136;
22 St. L. 162, Ch. 290;
Century Dictionary, article "a or an";
United States v. Oregon etc. Ry. Co., 164 U. S. 526;
United States v. Perry, 133 Fed. 841;
National Union v. Copeland, 171 Mass. 257;
State *ex rel.* v. Martin, 60 Ark. 334;
Commonwealth v. Wetzel, 2 S. W. Rep. (Ky.) 125.

IV.

There has been no departmental construction which can be permitted to control the construction of the statute.

Studebaker v. Perry, 184 U. S. 259;
United States v. Pugh, 99 U. S. 265;
United States v. Hahn, 107 U. S. 402;

Swift & Co. v. United States, 105 U. S. 691;
United States v. Graham, 110 U. S. 219;
Merritt v. Cameron, 137 U. S. 542;
United States v. Healy, 160 U. S. 136;
Louisville etc. Ry. Co. v. Kentucky, 161 U. S. 677;
Wisconsin etc. Ry. Co. v. United States, 164 U. S. 190.

V.

There has been no binding congressional interpretation.

R. S., Sec. 5155;
27 St. L. 33, c. 71;
31 St. L. 1444, Ch. 864, Sec. 21;
26 St. L. 62, Ch. 156;
Act of April 26, 1922;
Postmaster General v. Early, 12 Wheat, 136;
United States v. Claflin, 97 U. S. 546;
Endlich on Interpretation of Statutes (Ed. 1888), Sec. 372.

ARGUMENT.

I.

The Power of the State in the Premises.

At the October Term, 1922, this case was argued and submitted, following which this order was entered:

> "It is ordered that this case be restored to the docket for reargument at the next term on the issue whether the state had authority to institute and maintain a proceeding to question compliance by a national bank with its charter."

This question, of course, lies at the threshold of the case. It is an important question, for the reason that it necessarily involves an inquiry into the division of powers between state and national governments, and the power of state governments to control agencies inaugurated by the National Government in the execution of its own constitutional functions.

For, from McCulloch v. Maryland, 4 Wheat. 316, to First National Bank v. California, Ms. Op. June 4, 1923 (No. 276, October Term, 1922), national banks, organized under whatsoever acts of Congress, are declared to be "instrumentalities of the Federal Government * * * designed to be used to aid the Gov-

ernment in the administration of an important branch of the public service."

Indeed, such has been always recognized as the only justification for their creation by Congress. Banking corporations, as mere business institutions, the Congress could not constitutionally authorize. This, too, was declared as early as McCulloch v. Maryland, *supra*.

We point to the character of these institutions as of itself indicating that they cannot be withdrawn by state action from the control of the General Government, any more than can other agencies of the United States created as aids in the performance of its constitutional functions.

SUCH A PROCEEDING IS THE EXCLUSIVE FUNCTION OF THE NATIONAL GOVERNMENT.

A proceeding such as here is the exercise of supreme sovereignty.

As said by Mr. Justice Waite, speaking for the Court, in Ames v. Kansas, 111 U. S. 460:

> "The original common-law writ of *quo warranto* was a civil writ, at the suit of the crown, and not a criminal prosecution (*Rex v. Marsden*, 3 Burr. 1812, 1817). *It was in the nature of a writ of right by the king against* one who usurped or claimed franchises or liberties, to inquire by what right he claimed them (Com. Dig.

Quo Warranto A), and the first process was summons (*Id.* C. 2). This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a *quo warranto,* which, in its origin, was 'criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or *seize it for the crown*' (3 Bl. Com. 263). Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, *seizing the franchise*, or ousting the wrongful possessor; the fine being nominal only' (3 Bl. Com., *supra;* The King v. Francis, 2 T. R. 484; Bac. Ab. Tit. Information D; 2 Kyd on Corp. 439)."

We are not dealing here with the mere *names* of things, nor did that case so deal with the question. The writ of *quo warranto* has always been the appropriate means whereby the sovereign restrains his corporations within the limits of the grant. And, by whatsoever name termed, a proceeding having that object in view inheres in the sovereign which made the grant, as is definitely stated in Ames v. Kansas, *supra.*

Consideration of the cases in which this Court has had occasion to define the relations between the two governments, and the relations of the one to corporations of the other, do not leave the question here under consideration in doubt.

The nearest approach to the exact question is found in Territory v. Lockwood, 3 Wall. 238, where the territory undertook by *quo warranto* proceedings to remove one from an office, to be exercised in the territory, but under appointment from the United States. The right to maintain the proceeding was held to pertain only to the General Government. Mr. Justice Swayne, speaking for the Court, after pointing out the prerogative character of such a proceeding, said:

> "In Wallace v. Anderson, this Court said, 'that a writ of *quo warranto* could not be maintained except at the instance of the Government; as this writ was issued by a private individual, without the authority of the Government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question.' In the case of the Miners' Bank v. United States, on the relation of Grant, the information was filed in the name of the United States in the District Court of Iowa Territory. The sufficiency of the information in this respect does not appear to have been questioned. A state court cannot issue a writ of mandamus to an officer of the United States. 'His conduct can only be controlled by the power that created him.' The validity of a patent for land issued by the United States 'is a question exclusively between the sovereignty making the grant and the grantee.'

"The Judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the territory have no agency in appointing them and no power to remove them. The territorial legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the territory to prosecute such an information as this would carry with it the power of a motion without the consent of the government from which the appointment was derived. This the territory can no more accomplish in one way than in another. The subject is as much beyond the sphere of its authority as it is beyond the authority of the states as to the federal officers whose duties are to be discharged within their respective limits. *The right to institute such proceedings is inherently in the Government of the nation.* We do not find that it has been delegated to the territory."

It is believed that a proceeding of this nature as a motion from office is fundamentally not different from such a proceeding addressed to a corporation to inquire into the exercise of a corporate franchise. They each inherently pertain to the sovereignty which created the office or granted the franchise. If this be true, then the Lockwood case is positive authority that the state may not take over functions of the

National Government in the manner in which it is here attempted. The functions and nature of the proceeding, as explained in this case, differ not a whit from what was said of it in Ames v. Kansas, *supra*, where corporate franchises were in question.

In McClung v. Silliman, 6 Wheat. 303, referred to in the Lockwood case, the power of a state court to address a writ of *mandamus* to a register of an United States land office was denied, Mr. Justice Johnson for the Court observing:

> "It is not easy to conceive on what legal ground a state tribunal can in any instance exercise the power of issuing a *mandamus* to the register of a land office. * * * And here it is obvious that he is to be regarded either as an officer of that government or as its private agent. In the one capacity or the other his conduct can only be controlled by the power that created him; * * *."

In First National Bank v. Union Trust Company, 244 U. S. 427, congressional sanction was expressly held required for such a proceeding as here by state authorities. That case had many features similar to this, with the basic exception that *in that case there was congressional sanction for the proceeding; while, in this case, there is no claim of such.* In that case the Attorney-General of the state had brought such a proceeding in a state court to test the right of a na-

tional bank to exercise certain powers claimed under an act of Congress. This Court justified the proceeding on the ground that Congress had authorized it by the terms of the particular enactment under consideration. The narrow ground upon which the case proceeded in this respect is indicated by this language of Mr. Chief Justice White, speaking for the majority:

> "The question of the competency of the procedure and the right to administer the remedy sought then remains. It involves a challenge of the right of the state Attorney-General to resort in a state court to proceedings in the nature of *quo warranto* to test the power of the corporation to exert the particular functions given by the act of Congress because they were inherently federal in character, enjoyed by a federal corporation and susceptible only of being directly tested in a federal court. Support for the challenge in argument is rested upon Albeman v. Booth, 21 How. 506; Tarble's case, 13 Wall. 397; Van Reed v. People's National Bank, 198 U. S. 554, 557; State *ex rel.* Wilcox v. Curtis, 35 Connecticut 374. But without inquiring into the merits of the doctrine upon which the proposition rests, we think when the contention is tested by a consideration of the subject matter of this *particular controversy* it cannot be sustained. In other words, we are of opinion that as the particular functions in question by the express terms of the act of Congress were given

only 'when not in contravention of state or local law,' the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and *we place our conclusion on that ground.*"

Not all the members of the court agreed to this interpretation of the act of Congress there under review and, for the minority, Mr. Justice Van Devanter said:

"*The writ of quo warranto was a prerogative writ and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege or power claimed under the United States, it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned* (Wallach v. Anderson, 5 Wheat. 291; Territory v. Lockwood, 3 Wall. 236; Newman v. Frizzell, 238 U. S. 537). As is said in the Lockwood case, 'the right to institute such proceedings is inherently in the government of the nation.' This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose and 'are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit' (Davis v. Elmira Sav-

ings Bank, 161 U. S. 275, 283; Van Reed v. People's National Bank, 198 U. S. 554-557). Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them (McClung v. Silliman, 6 Wheat. 598, 605). If it were otherwise, the supremacy of the United States and of its Constitution and laws would be seriously imperiled (Ableman v. Booth, 21 How. 506; Tarble's Case, 13 Wall. 397; Tennessee v. Davis, 100 U. S. 257; State *ex rel.* Wilcox v. Curtis, 35 Conn. 374).

"*Thus much, as I understand it, is conceded in this Court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress.*"

The effect of the opinion in that case is that the state may proceed against a national bank to define the limits of its charter and restrain it within the limits thereof as so defined *when, and only when, Congress shall have so authorized,* and in cases where the power, if existing, is measured by the law of the state, as was the situation in that instance.

This is in keeping with the pronouncement in Van Reed v. People's National Bank, 198 U. S. 554, where, in upholding the validity of R. S., Sec. 5242, Mr. Justice Day, speaking for the Court, said that national banks "are subject to the control of Congress and

are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the Government may permit."

The whole matter was summed up, and, in our opinion, put at rest, in Massachusetts v. Mellon, Ms. Op. June 4, 1923 (No. 24, Original, of the October Term, 1922), where Mr. Justice Sutherland, speaking for the Court, said:

> "While the state, under some circumstances, may sue in that capacity for the protection of its citizens (Missouri v. Illinois and Chicago District, 180 U. S. 208, 241), *it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the Unted States, and not the state, which represents them as parens patriae,* when such representation becomes appropriate; and *to the former, and not to the latter, they must look for such protective measures as flow from that status.*"

To apply that pronouncement to the case in hand it may well be said: When the people of the United States created the National Government and endowed it with sovereign powers in certain respects, including the sovereign power to create national banks, they thereby conferred upon it the usual incidents of such sovereignty, *including the exclusive power and duty, as parens patriae, to restrain its*

corporate creatures within the limits of the corporate grant. No other view is at all compatible with the proper relations of the dual sovereignty under which we live. If the function here dealt with be a sovereign right (and no one doubts this), it must be the right of the sovereign which created the corporation, because the right of restraint flows exclusively from the right of creation. It was because, and only because, corporate grants flowed from the Crown that the Crown might restrain their exercise, and resume them if abused.

In Terrett v. Taylor, 9 Cranch 51, Mr. Justice Story, speaking for the Court, observed:

> "A private corporation created by the Legislature may lose its franchises by a misuser or a nonuser of them, and *they may be resumed* by the Government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture."

The control by the state of a corporate franchise granted by the General Government is nothing other than control of a function of the General Government itself. This is shown by the opinion of this Court in California v. Pacific Railroad Company, 127 U. S. 1 (40 *et seq.*), where the power of the state to tax a corporate franchise granted by the Congress was denied for this reason. We quote these excerpts

from the opinion of Mr. Justice Bradley in that pronouncement:

> *"They (i. e., the franchises) were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens.*
>
> * * * * * * *
>
> "What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject' (2 Bl. Com. 37). Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security.
>
> * * * * * * *
>
> "No persons can make themselves a body corporate and politic without legislative authority. *Corporate capacity is a franchise.*
>
> * * * * * * *

"The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty."

If, as there declared, taxation by a state of a corporate franchise emanating from the General Government is in effect taxation of the functions of that government, *how much the more must it be true that direct proceedings by the state to control the exercise of the franchise is in effect an effort to control the functions of the General Government?*

The State of Missouri would quickly resent, doubtless, any effort of the Federal Government to restrain the state's own corporate creatures within the limits of the powers conferred upon them, or, mayhap, to forfeit their corporate charters for departures therefrom. What considerations are there which lead to the affirmance of the power of the state here asserted, and to the denial of a coequal power of the General Government over corporations created by the state?

The relations of the two governments in this respect were carefully stated by Mr. Justice Brown in Hale v. Henkel, 201 U. S. 43 (75), where, after declaring the plenary powers of the General Government to enforce its own constitutional enactments

upon corporations created by the state, it was significantly said:

> "It is not intended to intimate, however, that it" (the Federal Government) "has a general visitatorial power over state corporations."

In view of that utterance it must be held that the powers of the state as to national corporations are limited to the enforcement of its own *valid* enactments: *or else somewhat of the sovereign powers conferred by the Constitution upon the National Government were reserved for enforcement by the states.* The latter is utterly subversive of our entire theory of government.

The cases of McCulloch v. Maryland, 4 Wheat. 316, and Osborne v. United States Bank, 9 Wheat. 738, dealt with much more than the power of the states to lay an incidental tax upon the property of a bank created by the National Government.

For, says Charles Warren in the Supreme Court, in United States History, Vol. I, p. 503, at the time those cases came to the bar of the Court for consideration this was the situation:

> "Indiana in its Constitution of 1816 prohibited the establishment of branches of any bank chartered outside of the state. The Illinois Constitution of 1818 prohibited the existence of any but state banks within the states. In November, 1817,

> Tennessee imposed a tax of $50,000 on any other than a state bank doing business in the state; in December, 1817, Georgia laid a tax of 31¼ per cent on every $100 of bank stock employed within the state (the Legislature declaring, by resolve, the next year, that this tax was only intended to apply to branches of the Bank of the United States); North Carolina, in December, 1818, imposed an annual tax of $5,000 on the branches of the bank. In February, 1818, there was enacted in Maryland a statute laying a heavy stamp tax on all notes issued by banks chartered outside the state, which tax might be commuted by the annual payment of $15,000; in January, 1819, Kentucky imposed a still heavier tax, compelling each branch in that state to pay $60,000 annually; the next month, February, 1819, Ohio rivaled Kentucky with a tax of $50,000 on each branch."

It was this attempt by the states to regulate, control and forbid the operations of agencies of the Federal Government which furnished the basis for the judgments in those two historic proceedings. How can the power of the state here asserted stand, in the face of this language of Mr. Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. 229 (p. 435):

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that

body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them."

The doctrine was further elaborated in Osborne v. United States Bank, 9 Wheat. 863, and the incapacity of the state to control national banks declared by the Chief Justice in this language:

"The business of the bank constitutes its capacity to perform its functions as a machine for the money transactions of the Government. Its corporate character is merely an incident which enables it to transact that business more beneficially.

"*Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so.* If, instead of the Secretary of the Treasury, distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expense, the profits of the banking business, in-

> stead of other emoluments to be drawn from the treasury, which banking business was essential to the operations of the Government, would each State in the Union possess a right to control these operations?"

This inquiry the opinion answers in the negative.

But yesterday, in First National Bank v. California, *supra*, the principles declared in these cases, and the others following them, were cited and applied.

Commenting on McCulloch v. Maryland, in Farmers Bank v. Minnesota, 232 U. S. 508 (521), Mr. Justice Brown, speaking for the Court, said:

> "The supremacy of the Federal Constitution and the laws made in pursuance thereof, and *the entire independence of the General Government from any control by the respective states, were the fundamental grounds of the decision.* The principle has never since been departed from, and has often been reasserted and applied."

Again demonstrating that state control of corporations created by the National Government is in effect to control the functions of that Government itself.

THE FUNDAMENTAL DIVISION OF SOVEREIGNTY.

Many cases, of which the following are typical, point to the fundamental division of sovereignty under our dual system of government, and the impos-

sibility of permitting the State to exercise those pertaining to the National Government.

In Abelman v. Booth, 21 How. 516, this division of sovereignty was thus defined by Mr. Chief Justice Taney (p. 138):

> "And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned."

And in Tarble's case, 13 Wall. 405, where a state court discharged a deserter from the army on the ground that his enlistment was invalid, Mr. Justice

Field, delivering the opinion of the Court, said on the same subject, after quoting the above extract from Ableman's case:

> "There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments."

* * * * * * *

> "Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement, neither is responsible to the other. How their respective laws shall be

enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

And in Tennessee v. Davis, 100 U. S. 257 (263), Mr. Justice Strong said for the Court:

"The United States is a Government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

PRIVATE PERSONS DENIED THE RIGHT BECAUSE IT IS THE EXCLUSIVE PROVINCE OF THE UNITED STATES.

This Court has frequently had occasion to announce the rule that private persons may not question compliance by a national bank with its charter powers—*the reason assigned for the rule being that such is the exclusive function of the National Government.*

Thus, in National Bank v. Matthews, 98 U. S. 621 (629), Mr. Justice Swayne, speaking for the Court, said:

> "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.
>
> "That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. *A private person cannot, directly or indirectly, usurp this function of the Government.*"

This language was quoted with approval in National Bank v. Whitney, 103 U. S. 99 (102); and in Reynolds v. Crawfordsville National Bank, 112 U. S. 405 (411), it was said that "only the sovereign can object" to accomplished acts of national banks in excess of their powers.

These cases demonstrate that the function here under question is inherently in the General Government, *which necessarily excludes its exercise by the state.*

Consequences of a Contrary Rule.

The consequences of a contrary conclusion to that here contended for are worthy of consideration. As said by Mr. Justice Shiras in Easton v. Iowa, 188

U. S. 220 (229), the purpose of the Congress in the enactment of the National Bank Act was the erection of an uniform system throughout the country. This purpose will be frustrated in large measure if each state possesses the power to assume the regulatory functions of the National Government with respect thereto.

And the confusion resulting from such a power being lodged in the states will not be limited to National Banks. In perfecting the monetary system of the country, the Congress has created a series of Federal Reserve Banks, operating throughout the country, having the most important and delicate relations to the finances of the country, and under the most direct control of the Government in the manner provided by the act. If National Banks are held subject to visitorial powers of the state—if the state may question the manner in which *these* perform their corporate functions, considerations are lacking for denying a similar control as to *those*.

When the country was in the throes of the late war the Congress created the Emergency Fleet Corporation and the United States Grain Corporation. It is only necessary to mention the occasion for, and the overwhelming importance of, these two creations to demonstrate that they could not have been submitted to state control, in the manner here attempted, without grave risk of the impairment of their efficiency in

a serious emergency, wherein delays and confusion would have entirely frustrated the purpose of the Government in their creation. And yet no reason can be assigned for conceding the power here asserted, which is not equally applicable in the instances suggested.

No Necessity for Such Powers in the States.

Nor is there any *necessity* for the assumption of such a power on the part of the state.

The Congress, by the National Bank Act (12 St. L. 680, Ch. 58, Sec. 55, 13 St. L. 116, Ch. 106, Sec. 56, R. S. 380) made provision for the prosecution in behalf of the National Government of all actions of a visitorial nature against national banks; and by the Judiciary Act (Judicial Code, Sec. 24, Sub. 16), conferred plenary jurisdiction on the national courts to hear and determine such.

We think there is no general belief that the functions of the General Government are so illy executed as to require that the execution of the laws of the United States should be intrusted to the states of the Union.

The Congress Have Not Conferred the Power.

It is not and cannot be successfully asserted that the Congress has attempted to confer the power here under inquiry upon the states.

An amendment to the National Bank Act in 1875 (18 St. L. 320, Ch. 80, Sec. 300-B) gave the courts of the states concurrent jurisdiction with the national courts over actions against national banks.

The Act of July 12, 1882 (22 St. L. 163, Ch. 290, Sec. 4) provided that jurisdiction of actions against national banks should be the same as and not other than jurisdiction of actions against banks not organized under the laws of the United States, except, significantly, "*suits between them and the United States, or its officers and agents;*" while the Judiciary Act of 1887-1888 (24 St. L. 554, Ch. 373, Sec. 4; 25 St. L. 436, Ch. 866, Sec. 4), provides that for jurisdictional purposes they shall be deemed citizens of the states in which they do business, again excepting "*cases commenced by the United States or any officer thereof.*" The Judicial Code (Act of March 3, 1911, 36 St. L. 1092, Ch. 231, Sec. 24, Sup. 16), after providing for jurisdiction in the national courts of actions against national banks by the Government or its officers, significantly provides that as to "all other actions" they shall be deemed citizens of the states in which they do business.

These statutes carry ample and commendable provisions for jurisdiction in the proper state courts of ordinary actions *inter partes* by or against national banks. They are entirely lacking in any suggestion of an intention to confer upon the states the sovereign

power of the United States in the enforcement of its own laws, and the control of its own agencies. It is one thing for the Congress to provide that state courts may entertain actions against national banks. It is quite another to provide that the state may assume functions inherent in the National Government in the sovereign regulation of its agencies. Such a surrender of the constitutional powers and duties of the United States should certainly not rest upon implication. In this case, there is not even a fair inference of such an intention in any legislation by the Congress.

THE STATE COURTS DENY THE POWER.

The power here being discussed has been the subject of examination by certain courts of the states, and denied.

The case of State ex rel. v. Curtis, 35 Conn. 374, was referred to in both opinions here in First National Bank v. Union Trust Company, *supra*. The opinion in that case is a very satisfactory exposition of this question, and expressly denies the power of the state which is here asserted. It is there said:

> "The power to create a corporation is an attribute of sovereignty, and the Government of the United States created the corporation in question, in the exercise of that independent and supreme sovereign power which the people dele-

gated to it by the Constitution. It is, therefore, the creature of that sovereignty, and amenable to and controllable by it and none other. * * * ''

After dealing with the prerogative nature of a proceeding such as here, the Connecticut Court said:

''Upon the same principles the information can lie only in the name of the United States, and in the federal courts, against those who invade a franchise *grantable or granted* by the National Government.

''As then the corporation in question is the creature of federal sovereignty, and in respect to its internal organization, operation and continual existence, is amenable to and controlled by that sovereignty alone; and as the writ in question is properly grantable by that sovereignty alone whose franchise has been invaded and violated, it would seem upon principle too clear for argument (if there be nothing more in the case), that the relator has erred in invoking the interference of another uninvaded and unviolated sovereignty, and the court below have erred in assuming jurisdiction and granting the writ.''

Dealing with the *factum* of federal incorporation, it was said:

''It was not created by us; it does not perform its functions under our authority, and it is the creature of and controllable by another and superior sovereignty. That other sovereignty is

exercised over the whole country, irrespective of state lines or state authority. It places its officers and agents and instruments wherever its necessities or its interests require, and necessarily within the limits of the states. With those officers and agents and instruments, in the exercise of their functions, state authority can in no way interfere. The national banks are its instruments by which it performs its functions in establishing a national currency; on that fact their constitutionality is placed, and in the exercise of the powers conferred upon them they are as independent of state control as the army, or navy, or the officers of the Subtreasury and Custom House, or any other instrumentality by which the functions of the Federal Government are performed. No other view is compatible with the principles of our own jurisprudence, or those recognized and declared by the Supreme Court of the United States in numerous cases, and particularly in the exhaustive opinion of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheaton 316. * * *

"Nor has there been any invasion of the sovereignty of this state, or violation of its laws, or any offense which the state is called upon to redress in its own behalf. It is a clear principle that where there has been no offense there can be no judicial jurisdiction, and equally clear that *a state has no authority to enforce a national law in behalf of the National Government.*

"And this is one of the class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the

National Government. The corporation in question, being the creature and instrument of that government, must necessarily be subject to that alone. By the common law and by our statute an information of this character lies as well to deprive a corporation of its charter as to determine the rights of its competing officers, and if the relator is right in this claim, its charter can be taken away and its franchises seized by the courts of the state. Nothing could be more repugnant in character than such an unauthorized interference, for such a purpose or for any purpose."

Kindred thereto is the opinion of the Supreme Court of South Carolina denying the validity of proceedings by the Attorney-General of that state to remove a presidential elector from office, of which the Court said (State *ex rel.* v. Bowen, 8 S. C. 400):

"*The familiar rule governing proceedings by quo warranto is that only the sovereign from whom the office, franchise or liberty—that is, the subject of controversy—originated, and into whose hands the same, if forfeited, would return, can maintain the remedy or authorize it by the allowance of his name as a means of asserting the title of right of a citizen to the same.* * * *

"*It is very clear that if the action in the nature of quo warranto is an appropriate remedy* under the claims made in behalf of the individ-

> uals who united with the state as plaintiffs, *such proceedings should be presented in the name of the United States.*"

In Harkness v. Guthrie, 27 Utah 248, was involved the common-law right of a shareholder to inspect the books of a national bank. In distinguishing this right of the shareholder from the sovereign right of visitation, the Utah Court observed:

> "*In the United States visitorial power over all except private eleemosynary corporations existing under and by virtue of the laws of a state vests in the state, and, as to those formed under an act of Congress, it vests in the General Government and is exercised through the medium of the courts,* or by visitors appointed for that purpose by or in pursuance of statutes. It is correctly stated in Merrill on Mandamus, Sec. 175, that 'visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings.' "

That case came here, and the views of the Utah Court were approved (Guthrie v. Harkness, 199 U. S. 156). It was held that the common-law right of the shareholder to examine the books of the corporation was one thing; the power of visitation of the sovereign another.

Mr. Justice Day, speaking for the Court, said (199 U. S., l. c. 157-158):

> "The visitation of civil corporations is by the Government itself, through the medium of the courts of justice. * * *
>
> "At common law the right of visitation was exercised by the king as to civil corporations and as to eleemosynary ones by the founder or donor (1 Cooley's Blackstone 481)."

The other side of the shield is presented by the opinion of the Supreme Court of Ohio in State *ex rel.* v. Cincinnati etc. Railway Co., 7 Lawyers' Reports Annotated 319. This was a proceeding in *quo warranto* against a railroad company chartered by the state, for a violation of its charter by reason of discriminations in interstate commerce. Because of the paramount right of Congress to regulate interstate commerce, the respondent challenged the right of the state to so proceed.

The Ohio Court denied the contention, saying:

> "As the state was not bound to create it in the first place, it is not bound to maintain it, after having done so, if it violates the laws or public policy of the state or misuses its franchises to oppress the citizens thereof.
>
> "For such offenses the state, acting through its Legislature and courts, and in the exercise of a sound discretion, may either destroy the cor-

poration entirely, by forfeiting its charter, or oust it from the wrongful exercise of its powers; and if, instead of, or in addition to, misusing the franchises actually conferred, it usurps others, the circumstance that the usurped franchises relate to and concern commerce between the states ought not to deprive the state of its visitorial power. *If the state creating the corporation is deprived of its power, none exist elsewhere. 'The government creating the corporation can alone institute such a proceeding* (*quo warranto* to adjudge forfeiture of a corporate franchise), since it may waive a broken condition of a compact made with it' (Angel & A. Corp., Sec. 777, and cases cited. See note 6)."

Such are the pertinent authorities on the question. That they deny the power of the state here under inquiry cannot be gainsaid.

NEITHER THE STATE NOR THE STATE COURT ASSERTS ITS EXISTENCE.

Indeed, no such power is either asserted by the state nor found to exist by the state court.

The brief of the learned Attorney-General will be searched in vain for any assertion of power inherent in the state to enforce upon a national bank observance of its charter powers and duties. Likewise, the opinion of the state court. The brief filed in

behalf of various Attorneys-General of sundry states asserts no such power.

The argument in behalf of the state and the opinion of the state court do no more than contend: The Congress have not conferred the questioned power on the bank; the state law forbids its exercise (of which anon); *and the state may enforce upon the bank observance of its statutes.*

Certainly no authority is cited from any source justifying the conclusion that the State may thus assume functions of the General Government.

Various decisions are cited in which actions have been held proper for the vindication of *private right*— but none asserting that the state is *parens patriae* in the matter of restraining the activities of agencies of the United States.

Much stress is laid apparently upon First National Bank v. Commonwealth, 143 Ky. 816, in which the Kentucky Court affirmed the right of that state to enforce upon a national bank its statutes escheating real property, if held beyond the period of time allowed by the state statute. But a state has powers respecting the devolution of title to real estate within its borders, which do not exist with regard to the control of agencies of the General Government in other respects. This principle may justify the conclusion at which the Kentucky Court arrived. Hav-

ing in mind the specific legislation of the Congress concerning the right of national banks to acquire and hold title to real estate, however, it seems more than probable that this decision of the Kentucky Court is not in harmony with the views recently expressed here on the same question in First National Bank v. California, *supra.*

At any rate, the Kentucky case, of whatsoever weight on the question dealt with, has no bearing on the right of the state to maintain proceedings to restrain a national bank within the limits, or supposed limits, of its charter.

Reference is also made to Missouri v. Holland, 252 U. S. 416, where the state was permitted to maintain an action to test the validity of the Migratory Bird Treaty with Great Britain, and statutes enacted in its enforcement; but as said by Mr. Justice Holmes, speaking for the Court in that case, the state had a pecuniary interest "as owner of the wild birds within its borders" which is entirely absent here.

To paraphrase the inquiry propounded by the Court for reargument: Alike upon principle and upon precedent, a state is without power to institute proceedings to question compliance by a national bank with its charter powers; for the reason that (quoting the Lockwood case, *supra*) "*the right to institute such proceedings is inherently in the Government of the Nation.*"

II.

The Validity of the State Statute.

A state statute inhibits a banking institution to establish branches. It was enacted as a part of a statutory scheme for the incorporation of state banks, and the regulation of their activities. It seems a perversion of its obvious purpose to say that it was intended to apply to national banks, but the state court has so interpreted it, and, under familiar rules, that interpretation must be accepted here.

Wherefore, arises the inquiry: Is such a statute valid as applied to a national bank? Because we doubt not that, if the state has power to enact such a statute, it has plenary power to enforce it. A condition of sovereignty which will admit of the enactment, but not the enforcement, of legislation is anomalous to the degree of impossibility.

The same considerations which deny to the state the power to lay limitations upon the charter powers of national corporations through visitation in the courts would seem also to deny this power through legislation. Each is the exercise of sovereignty; the one no more than the other.

The argument here in behalf of the state is that since Congress has not legislated on the subject the state has the power to forbid it. The source of the power is sought in certain decisions of this Court,

affirming the power of the state to bind national banks in their dealings with the community, *by general legislation*. Reference is had to National Bank v. Commonwealth, 9 Wall. 353 (362); Davis v. Elmira Savings Bank, 161 U. S. 275 (283), and McClellan v. Chipman, 164 U. S. 347 (357), and the argument advanced that this statute neither conflicts with the act of Congress nor impairs the efficiency of the bank to perform its duties to the General Government—therefore it is valid. We believe it capable of demonstration that such legislation both conflicts with the act of Congress and may be so directed as to impair the efficiency of the bank to perform its duties to the General Government.

State Legislation Respecting the Powers of National Banks Impair Their Efficiency.

The proposition is that a state may by statute deny a national bank the power to have branch offices; or, conversely, by statute, compel it to conduct its business activities within a single building. If such power exists, it will not cease to exist because of the extent of its exercise. If state legislation may restrain a national bank within four walls, it may likewise prescribe the cubic capacity of the structure, limit and restrict the number of employes, and otherwise so cripple the institution by inimical legislation as to render it of no avail as an instrumentality of the Gov-

ernment. If the state may so legislate respecting a national bank, then, as in effect pointed out in Osborne v. United States Bank, *supra*, its power to so restrain the Post Office Department, the Collector of Internal Revenue, or any other officer of the National Government, must likewise be conceded. And the validity of the legislation is so tested, not by its particular provisions, but by the *power* to enact it. The state legislation respecting national banks, which was held invalid in McCulloch v. Maryland and Osborne v. Bank, was not condemned because its provisions were onerous, but because of an entire lack of power to enact it—because (as said in McCulloch's case) the sovereignty of the state did not extend to the regulation of the business of national banks, without reference to the nature of the regulations prescribed.

THE CONGRESS HAVE DEFINED THE POWERS OF NATIONAL BANKS AND THEREBY EXCLUDED STATE LEGISLATION.

The Congress created this bank and defined its powers. Under the National Bank Act it either has or has not the power to have a branch office as it here attempts. If it has the power, it is because such has been (expressly or impliedly) conferred by the Congress. If it has it not, then by the same act of Congress it is forbidden to exercise it.

For every legislative grant of corporate power is a legislative exclusion of power not granted.

In Thomas v. Railroad Company, 101 U. S. 71 (82), Mr. Justice Miller said for the Court on this subject:

> "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that *the enumeration of these powers implies the exclusion of all others.*"

This language was quoted with approval in Penn. Co. v. St. Louis etc. Railway Company, 118 U. S. 291 (307), and in Central Transportation Company v. Pullman's Car Company, 139 U. S. 24 (43).

This rule has been applied to the statutes dealing with powers of national banks. Thus in First National Bank v. National Exchange Bank, 92 U. S. 122 (128), Mr. Chief Justice Waite, delivering the opinion, said:

> "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power."

Therefore, when the Congress created this bank, and endowed it with certain powers, they by the same legislative act forbade it to exercise others. The whole legislative field, therefore, respecting the powers conferred has been occupied by the Congress, and there is no room for state legislation on the subject.

If the bank has asserted power the state cannot take it away. If the power does not exist under the Act of Congress the state cannot confer it by affirmative legislation. Legislation is the will of the sovereign enforced upon the citizen without his consent. It is the supreme expression of sovereignty. *State legislation which is only valid when expressed negatively, and not affirmatively, is not legislation at all.* State legislation, which is only valid when it conforms to the express or implied provisions of Acts of Congress dealing supremely with the same subject, is not sovereign legislation. Else, by echoing Acts of Congress relating to interstate commerce and other matters committed exclusively to the charge of the National Government, the state may take over the entire functions of that Government, through the guise of enforcing its own statutes.

THE DECISIONS ON THE SUBJECT.

It is not difficult to ascertain from the course of decision in this court what is intended by the ex-

pression that general state laws are valid in relation to national banks if they do not conflict with national legislation or impair the efficiency of the banks as agencies of the General Government. So far as we ascertain that expression was first made use of by Mr. Justice Miller in National Bank v. Commonwealth, 9 Wall. 353 (361). The case dealt with the validity of certain regulations prescribed by the state *in enforcing the power conferred by the Congress to tax shares of national banks.* The expressions were these:

> "The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the Government he ceases to be subject to the laws of the state. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that Government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the states. The salary of a federal officer may not be taxed; he may be exempted from any personal service

which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the state for the shares of their capital stock, *when the law of the Federal Government authorizes the tax.*"

The principles to be deduced are that these banks, having been chartered to do business in the states, must perforce be subject in so doing to the *general laws* of the state in which they are situate, and that taxing regulations *enacted by the authority of the Congress must be deemed valid, unless they are so framed as to cripple the efficiency of the bank as an agency of the Federal Government.* This is the only

case in which the formula has been expressed *in the negative*, and the expressions of that opinion must be read in the light of the question under discussion.

In Davis v. Elmira Savings Bank, 161 U. S. 275 (283), Mr. Justice White expressed the same thought *in the affirmative, i. e., that state legislation respecting national banks is invalid if it conflicts with congressional action or impairs the efficiency of these agencies, with no suggestion that this definition comprehended all possible invalid legislation with respect to national banks.*

The same situation exists with respect to the expressions of the Court in McClellan v. Chipman, 164 U. S. 357, and in First National Bank v. California, Ms. Op. No. 276, October Term, 1922, where Mr. Justice McReynolds observed with respect to such institutions that *"their contracts and dealings are subject to the operation of general and undiscriminating state laws* which do not conflict with the letter or the general object and purposes of congressional legislation."

The principles declared in Easton v. Iowa, 188 U. S. 220, serve to further elucidate the character of legislation which the states may not enforce against national banks.

With respect to the purpose of the National Bank

Act, Mr. Justice Shiras, speaking for the Court, said (*l. c.* 229):

> "That legislation has in view the erection of a system extending throughout the country, and *independent, so far as powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states.*"

As to which it is to be observed that recognition of the validity of the state statute here under consideration is to hold that national banks are not "independent, so far as powers are concerned, of state legislation," contrary to the express declarations of that opinion.

In Farmers' Bank v. Dearing, 91 U. S. 29 (34), Mr. Justice Swayne observed that national banks were agencies designed by the National Government to accomplish its ends, and then said:

> "Being such means, brought into existence for this purpose, and intended to be so employed, *the states can exercise no control over them*, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.'"

This language was quoted as declaring the correct principle applicable in Easton's case (188 U. S. 237).

In the course of the opinion in the latter case the utterances of the Pennsylvania Court on the same question were quoted with approval thus (188 U. S. 233):

"In *Allen's Appeal,* 119 Pa. St. 192, the question was whether a state law, which forbade 'any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation or calling other than his duty as cashier,' and which declared the same to be a misdemeanor, was applicable to the cashier of a national bank, and it was held that it was not so applicable, the Court saying, among other things:

" 'The National Banking Act and its supplements create a complete system for the government of those institutions. *Conceding the power of Congress to create this system, we are unable to see how it can be regulated or interfered with by state legislation.* The Act of 1860, if applied to national banks, imposes a disqualification upon cashiers of such institutions where none has been imposed by act of Congress. If the state may impose one qualification upon the cashiers, why not another? If upon cashier, why not upon the president or other officer? Nay, further, suppose the Legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, or should be the owner of one hundred shares of stock, could we apply such an act to national banks? If so, such institutions would have a precarious existence. They would

be liable to be interfered with at every step, and it might not be long before the whole national banking system would have to be thrown aside as so much worthless lumber.' ''

In the light of these utterances the fundamental soundness of which cannot be questioned, and which were reviewed, and quoted as in part the basis for the judgment in First National Bank v. California, *supra*, it must be held that any attempt by a state to define or limit the corporate powers of a national bank is void as an invasion of a field which pertains exclusively to another sovereignty.

CONGRESS HAVE PROMULGATED ALL REGULATIONS INTENDED TO BE OPERATIVE.

And, indeed, upon correct principles, *any* legislation by a state with respect to the powers and functions of national banks necessarily conflicts with Congressional regulations on the same subject. For the Congress, in defining the powers of these institutions, must be assumed to have promulgated all the regulations intended to be operative. It is not permissible for the state to fill any assumed *hiatus* in these, either negatively or affirmatively. This is demonstrated by these observations in Easton v. Iowa, 188 U. S. 236:

''A leading case in which this Court had occasion to consider the limitation of legislation by a

state affecting a subject within the scope of action by Congress is that of *Prigg v. Pennsylvania*, 16 Pet. 539, from which we quote the following observations:

"'*If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.* In such case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. *Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.*'"

In California Bank v. Kennedy, 167 U. S. 362 (365), it was held that powers of a national bank are controlled only by national legislation.

Mr. Justice White, delivering the opinion, said:

"Before discussing the merits we will briefly consider and dispose of a suggestion that no federal question appears by the record to have been properly raised below, and, therefore, there is a want of jurisdiction in this Court to review the judgment. The answer averred that if any stock of the savings bank appeared to have been issued

to the national bank, it was 'issued without authority of this corporation defendant, and without authority of law.' *In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation; that is, the law of the United States.*"

WHEN A STATE STATUTE CONFLICTS WITH CONGRESSIONAL ACTION.

The expression that a state statute relating to a national bank is void if it conflicts with the act of Congress must be held, in the light of the decisions of this Court, to be of broader significance than a mere *express conflict in provisions.* It is by no means limited to those instances where the act of Congress provides one thing and the state statute the converse.

Witness Farmers etc. National Bank v. Dearing, 91 U. S. 29, where the Act of Congress prescribed the loss of interest for usury, while the state statute also provided for the loss of the debt. There was no express conflict in the two statutes. Both might well have been enforced, if both had been valid. But Congress, having dealt with the subject, it was held that the state could not do so.

Witness, also, Easton v. Iowa, 188 U. S. 220, where Congress had dealt with the insolvency of national banks, and the disposition of their assets, but had not dealt with the matter of accepting deposits while insolvent, as a crime of an officer of such a bank. Nevertheless, a state statute dealing therewith was held void.

Witness, also, First National Bank v. California, Ms. Op. No. 276, October Term, 1922 (June 4, 1923). Congress had not expressly dealt with the disposition of unclaimed deposits in national banks, but the power of the state to do so was denied.

The rule deducible is that Congress, having legislated concerning the powers and internal management of national banks, have presumably so declared all regulations desired; and no state statute can enter that field without encountering either what the Congress have expressly or impliedly said, or what they determined not to say.

Visitorial State Statutes Forbidden by the National Bank Act.

Not only is the state statute here under consideration invalid, upon the principles declared by this Court, but it seems to us to have been expressly forbidden by the Congress.

In Guthrie v. Harkness, 199 U. S. 157, as heretofore quoted, it was declared that corporate visitation is,

in part, at least, a legislative function. In the light of that opinion we understand the term to embrace both legislative regulations and the enforcement thereof by the sovereign. That it does include the former is the express declaration in that case.

The National Bank Act provides methods of incorporation, corporate powers, duties, functions and restrictions, and various methods of control in behalf of the United States.

Having so provided, the act further declares (R. S., Sec. 5241):

> "No association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice."

By the Act of December 23, 1913 (38 St. L., Part 1, 272 Ch. 6, Sec. 21), this further provision was enacted:

> "No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice, or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized."

The result is that the Congress have expressly excluded the law-making power of the states from the enactment of visitorial statutes with respect to na-

tional banks. So that, if the power otherwise existed, it has been denied by the National Legislature. It is believed, however, that the principles declared in the decisions of this Court, herein cited, demonstrate the invalidity of state statutes defining or limiting the corporate powers of national banking associations.

III.

The Powers of the Bank.

THE SCOPE OF THE INQUIRY.

In dealing with this question it is well to keep in mind precisely what this bank is charged with having done. It is said in the information (Rec., pp. 1-3) that the bank was incorporated under the National Bank Act to conduct a banking business in the City of St. Louis; that for a number of years it had its banking house at a named corner therein; that latterly it had established "several blocks" removed from this corner a branch bank, wherein it was also conducting its banking business; and that it proposed to establish other similar places at other points in the city for the same purpose.

The term "branch bank" or branch office of a banking institution is not an expression of certain significance. It may denote practically a separate institution, with its own separate capitalization and manage-

ment, and located remote from the parent institution. No such is charged here.

In its ultimate analysis the head and front of offending of the plaintiff in error is that through the same management and under the control of the same directorate it has attempted to establish contact with its customers and meet their banking demands at more than one point in the City of St. Louis. As it is not an eleemosynary institution, it is highly probable that economic conditions in that community make it desirable that it so conduct its business in the opinion of those responsible for its welfare. The inquiry is: Has it the power under the National Bank Act to so do?

Having in mind what is charged, it is manifest, we believe, that the real inquiry is whether or not a national bank must conduct all its activities under *one roof*. The adverse contention, we also believe, resolves itself into the claim that, while a national bank may expand perpendicularly *ad libitum, it may not expand horizontally without occupancy of all the intervening space.*

If such is found to be the intent of the Congress, it must be obeyed, of course, but we do not believe any such restricted interpretation of the act is called for by its terms, nor by any probable purpose of the Congress in its enactment.

BANKING NOT A PRIVILEGE.

While the business of banking is of a nature to make it proper that it be regulated by the Legislature, it is, nevertheless, not a privilege, but a natural right.

Said Mr. Chief Justice Taney, speaking for the Court, in Bank of Augusta v. Earle, 13 Pet. 517, 595:

> "The institutions of Alabama, like those of the other states, are founded upon the great principles of the common law; and it is very clear that, at common law, the right of banking in all of its ramifications belonged to individual citizens, and might be exercised by them at their pleasure. * * * Undoubtedly, the sovereign authority may regulate and restrain this right."

The Supreme Court of California, in Bank of California v. San Francisco, 142 Cal. 276, 279, said:

> "Admittedly, the mere right to do a banking business is not a franchise, in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that the right to do a grocery or dry goods business is available to all citizens, and no grant from the sovereign is essential to its existence. Any individual or any number of individuals may, under such regulations as the state in the exercise of its police powers may legally make, engage therein, without any grant from the state." * * *

And in Curtiss v. Leavitt, 15 N. Y. 9, 52, the Court of Appeals of New York said:

> "Banking is not in its nature a corporate franchise. In the absence of legislative restraint, it may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc."

CORPORATE FRANCHISES NOT IMPLIEDLY RESTRICTED AS TO PLACE.

In the absence of legislative inhibition, the grant of a corporate franchise may be exercised anywhere within the geographical limits of the sovereignty which confers the franchise.

"If," says Mr. Fletcher, "there are no express or implied restrictions in its charter, a corporation may locate and carry on its business at any place within the state" (Fletcher on Corporations, Vol. 2, Ch. 21, Sec. 806, citing City Bank v. Beach, 1 Blatch. [U. S.] 425; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149; Stickle v. Liberty Cycle Co., 32 Atl. 708).

In Loyd's Executorial Trustees v. Lynchburg, 113 Va. 627, it is said:

> "Independent of statute, it is not essential to the existence of a corporation that its principal office shall be fixed, or, indeed, that it shall have a principal office; * * *."

Quite generally, in the United States, corporations are no longer formed by direct legislative action, but by act of the parties under general laws. These usually require that the articles of association shall designate the place of business or the principal place of business. This, for obvious visitorial and other governmental purposes. But, by common consent, these are not taken as limiting the business activities of the corporation to the place designated. It is universally recognized that corporations so created may establish themselves in other localities as well, and there pursue, unhindered, the entire corporate function with which they have been vested.

Wherefore, and inasmuch as the business of banking is not a privilege, but a natural right, except as regulated by the Legislature, a banking corporation is no more inherently restricted as to locality than any other corporation whatsoever—this is to say, in the absence of legislative inhibition, a banking corporation may conduct its corporate activities anywhere within the geographical boundaries of the sovereign which gave it being, as freely as may any other corporation formed for any other purpose. This power of a corporation to conduct its activities in places other than that designated in its charter as the (corporate) place of business is, by common consent, one of the implied or incidental powers following upon the express grant.

INCIDENTAL POWERS OF NATIONAL BANKS.

The National Bank Act, it will be noticed, expressly confers on such banks such incidental powers as are necessary to carry on the business (R. S. Sec. 5136, Sub. Seventh).

In First National Bank v. National Exchange Bank, 92 U. S. 122 (126), where Mr. Justice Waite, speaking for the Court, said respecting the powers of national banks:

> "Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. * * * Banks may do, in this behalf, whatever natural persons could do under like circumstances."

In Green Bay etc. R. R. Co. v. Union etc. Co., 107 U. S. 98 (100), Mr. Justice Gray observed:

> "But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited (Thomas v. Railroad Co., 101 U. S. 71; Attorney-General v. Great Eastern Railway Co., 5 App. Cas. 473; Davis v. Old Colony Railroad Co., 131 Mass. 258)."

The power here under inquiry would certainly be among the ordinary, incidental powers of an ordinary corporation.

Accordingly, it must be held that this bank possesses the power which it has attempted to exercise, unless the Congress have forbidden its exercise.

THE PROVISIONS OF THE NATIONAL BANK ACT.

The National Banking Act, after providing that banks may be formed by five or more persons entering into articles of association, which shall specify in general terms the object of its formation (R. S. Sec. 5133), then provides (R. S. Sec. 5136) that the organization certificate shall specifically state:

> "The place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village."

This being done, the act then provides that the bank shall have power to regulate by by-laws "how its general business (shall be) conducted and the privileges granted it by law exercised and enjoyed," and "to exercise * * * all such incidental powers as shall be necessary to carry on the business of banking," etc.

The plaintiff in error complied with these requirements, designating the City of St. Louis as "the place

where its operations of discount and deposit were to be carried on" (Rec., p. 1).

The word "place" as used in R. S. Sec. 5190, quoted above, does not mean the location within the "county, city, town or village," but means the county, city, town or village within which the operations of the bank are to be carried on.

This is not only the necessary effect of the language used, but is also the judicial construction given thereto.

This Court had occasion to consider the meaning of the words "the place" as used in section 5136 and section 5190, in McCormick v. Market National Bank, 165 U. S. 538 (549), where Mr. Justice Gray, delivering the opinion of the Court, said:

> "The provision of section 5190 that 'the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate' refers to its 'usual business' after obtaining its certificate from the comptroller; and to 'the place,' that is, the city or town in which, after it has been authorized by the comptroller's certificate to commence its business of banking, its office or banking house is located."

Like construction was given to these words by the Supreme Court of Illinois (McCormick v. Market

National Bank, 162 Ill. 100, l. c. 108), where that Court said:

> "The association is required, in its organization, to state the place where its operations of discount and deposits are to be carried on, but by this is meant the town or city, not the room, street or number in such town or city."

The provisions of R. S. Sec. 5136, that a bank must, in its organization certificate, designate the city, town or village within which it proposes to do business; of R. S. Sec. 5190, that its place of business must be located therein; and of Act of May 1, 1886 (24 St. L. Ch. 73), that it may remove to some other city on authority from the Comptroller, seem to clearly indicate an intention on the part of the Congress to limit the business activities of such institutions to the place designated in the organization certificate.

But since the "place" so designated has sole reference to the city mentioned in the organization certificate, and since the plaintiff in error is not charged with engaging in banking outside the City of St. Louis, it is apparent that the position of the Attorney-General cannot be sustained unless the Congress shall be found to have restrained the bank as to its place of business *within* the city, town or village designated in the certificate.

If such restraint exists, it is to be found in Revised Statutes, Sec. 5190, which provides:

> "The usual business of each national bank shall be transacted at an office or banking house located in the place specified in its organization certificate."

It is upon the provisions of this section that the Attorney-General of the state rests his contention, and the state court its conclusion, that the Congress have forbidden national banks to establish branch offices for the transaction of a banking business within the respective cities in which they do business.

This Court, so far as our investigations bring to light, has had occasion to consider this statute on only one occasion, viz., in Merchants National Bank v. State National Bank, 10 Wall. 604 (651). In that case it was ruled that the act of a cashier of a national bank in certifying a check away from the banking house was valid—Mr. Justice Swayne, who spoke for the Court, saying that the provisions of the act with respect to the place of business of the bank "must be construed reasonably."

Having in mind that the words "the place" mean the territorial area within which the bank is authorized to do its business, and not a designated lot

or building located in such area, the question arising under section 5134 is this:

Is that section a *limitation* or a *command?*

Does that section place a limitation upon the manner or method or the number of offices in which the granted charter powers shall be exercised, or does it command that they shall be exercised in a place of business, *i. e.*, an established office or banking house as contradistinguished from a peripatetic banking business?

The natural reading and the manifest purpose of R. S. Sec. 5190 is that the bank shall have "an office or banking house" located in the "place" in the city, town or village designated in its organization certificate—not that it shall have "but an office" or "only one office." These, or those of like import, would have been the chosen words if limitation had been the legislative purpose.

The statute commands that the bank shall maintain an office or banking house.

The purpose of the command is that there shall be at least one place of business where those who want to transact business with it may do so—where the State's Attorney-General, as he saw fit to do in this case, may serve it with process—where the Attorney-General of the United States, if he saw fit, as he did not see fit in this case, may do likewise—where anyone who has business with the bank may seek it out

and transact that business—that it shall exercise the granted powers at a place of business (office or banking house) and not upon the sidewalks or in the streets.

The statute is little more than the familiar statute, common to most, if not all the states, concerning both foreign and domestic corporations that they shall, in the place where organized, maintain at least one known place of business.

It is a command that it shall have an office, but not an inhibition against its having more than one.

If the Congress had intended that a national bank should confine its business activities to one building or one room, they would have chosen language capable of plainly conveying that idea.

The fact is that the Congress were doing no more than dealing with the bank as an institution, as an agency of the Government of the United States, and *not at all with the physical characteristics, or juxtaposition of the structure or structures which, taken together, might, from time to time, constitute its banking house.* And, under the correct interpretation of the act, the entire premises in which it transacts a banking business (within the city of its choice) comprise its "office or banking house" within the meaning of this section. And that is true whether these be all under one roof, or part under this roof

and part under the other—part in this square and part in the next.

The act was not passed for a day or a year. The original period of corporate life was twenty years (R. S. Sec. 5136, Sub. Second). Renewal privileges were subsequently added (Act July 2, 1882, 22 St. L. 162, Ch. 290). To say that the Congress, in providing a permanent national banking system to grow with the country, at the same time intended that the business of these institutions, no matter what the exigency, should always be in *physical* contact, *instead of merely maintaining economic supervisory contact,* is to argue that the Congress were building up with one hand and destroying with the other.

In one of the large cities of the United States a national bank has its contact with the community on the ground floor of a building, while its accounting department and directors' rooms are many floors above, the intervening space not being under its control. So far as proximity is concerned, the latter might as well be located "several blocks away" (to quote the information in this case). If the Act of Congress means what the State here contends, that institution is violating its provisions. And yet probably none would so contend.

It is also to be noted that R. S. Sec. 5190, if interpreted as dealing with the physical structure and contiguity of the place of business of a national bank,

contains no exceptions. If, as the state contends, the business of the bank must be limited to one office, then it is *all* so limited. And yet, so interpreted, *probably every national bank in every large city in the United States is daily engaged in violating it. For, in every such city the banks are, and have been for years, organized into a clearing house, with separate offices and paid officials, where the very important banking business of paying checks and receiving payment of checks is daily transacted by all of them.* And yet, if a national bank may not *alone* have a branch office for part of its business, several of them may not *jointly do so.*

Those offices, buildings and structures which the bank occupies for the transaction of its banking business, whether united physically, or only by the unity of use, constitute its office or banking house within the true intent and meaning of this statute; just as the offices and various structures of a manufacturing industry constitute its plant or works, whether in a single building or separated by walls, by intervening space, or by other buildings. *It was the singleness of use, and not details of bricks and mortar, with which the Congress were dealing.* The bank was to have a known place of business for various and obvious reasons; but whether to be composed of a single structure or more than one, and the relation of the component parts to the whole in

proximity (within the designated city) was left to the board of directors, to be solved by the exigencies of the situation from time to time, with due regard to the proper growth of the business of the bank.

The conclusion that this bank has been denied power to do that which it here seeks to do can only be arrived at by an alteration of the language used by the Congress. The provision of R. S. Sec. 5190 is that "the usual business of each national bank shall be transacted at an office or banking house located," etc. If the plaintiff in error transacts a portion of its usual business at its main banking house and another at a branch office "several blocks away" (as charged), by what process of ratiocination can the conclusion be arrived at that it is transacting any part of its business other than "*at an office or banking house located in the place specified in its location certificate?*"

Which serves to point the fundamental distinction between this statute, as framed by the national legislature, and a statute requiring that the business of the bank be transacted at a single banking house, or carrying words of similar import. This enactment cannot be so read without doing violence to the language employed in its enactment. For *the indefinite article "a" or "an" is not ordinarily a word of limitation.*

In the Century Dictionary, in definition of the article "a" or "an," it is said:

> "Usually, as the indefinite article proper, it points out, in a loose way, as one of a class containing more of the same kind."

In United States v. Oregon etc. Ry. Co., 164 U. S. 526, Mr. Chief Justice Fuller, speaking for the Court, said:

> "The general rule is that 'words importing the singular number may extend to and be applied to several persons or things; words importing the plural number may include the singular,' as provided in U. S. Rev. Stats., Sec. 1."

In United States v. Perry, 133 Fed. 841, on the principle that the article "a" may be interpreted to include more than one, the Board of General Appraisers and Judge Hazel, of the Southern District of New York, united in the view that a certain duty prescribed upon a statue cut from "a solid block of marble" was applicable to such a creation cut from several solid blocks of marble and combined.

In National Union Bank v. Copeland, 171 Mass. 257, it is said:

> "The article 'a' is not necessarily a singular term. It is often used in the sense of 'any' and is then applied to more than one individual object."

A provision of the Constitution of Arkansas, providing for the election of "a" judge in each judicial circuit, was held not to inhibit the General Assembly from providing for the election of more than one judge in the same circuit. The Court said (State *ex rel.* v. Martin, 60 Ark. 334):

> "Now, the adjective 'a,' commonly called the 'indefinite article,' and so called, too, because it does not define any particular person or thing, *is entirely too indefinite,* in the connection used, *to define or limit the number of judges* which the legislative wisdom may provide for the judicial circuits of the state. * * * According to Mr. Webster, 'a' means 'one' or 'any,' but less 'emphatically than either.' It may mean one where only one is intended. That is the trouble. *Of itself it is in no sense a word of limitation.* * * * The Constitution requires 'a judge' for each circuit, and there must be at least one judge. But where is the limitation upon the Legislature to provide for more if the necessity arises? * * *"

In Commonwealth v. Wetzel, 2 S. W. Rep. 125, the provisions of a Kentucky statute conferring powers upon "a judge" was held by the Court of Appeals of that state to be equivalent to *any judge.*

There are, of course, instances where the circumstances or the context of a statute may require that the indefinite article be read as the equivalent of the

word *one,* and hence to function as a limitation. Nothing in the context of this statute so requires. Having in mind that the statute is to have a reasonable interpretation (National Bank v. State National Bank, 10 Wall. 604), the statute seems to us to be a command rather than a limitation, and the substitution of the word "one" for the word "an" by construction is not justified.

The Congress, in our opinion, meant no more than that the bank should be located, rather than peripatetic—that its business should be so conducted that all might know *where* it was being done, to the end that those interested might know *how* it was being done; that records might be kept of its transactions, available alike to its directors, its stockholders and the representatives of the Government, its master. It seems wellnigh inconceivable that in creating a system, national in scope, and evidently intended as a permanent part of the economics of the country, the Congress would undertake to confine their activities beneath one roof, or to contiguous quarters, under any and all circumstances, and no matter how this might serve to hamper their legitimate transactions by reason of local conditions, rendering it impossible to secure at once adequate and contiguous quarters. And it is to this contention that the contrary argument comes when reduced to its essentials.

The history of banking at large furnishes no reason to suppose the Congress to have been opposed to national banks having a place of business at more than one point in the place in which they are located, if physical surroundings, economic advantage, or the legitimate pursuit of business seem to the board of directors to require such a course.

The greatest banking nation of the world has always encouraged branch banking in a much more extended form than it is here in question (*i. e.*, the extension of activity beyond the city in which the bank is located). The Dominion of Canada, to our north, pursues the same policy.

There is no settled policy on the subject in the states of the Union. In some, branches are permitted in the city where the bank is located; in others, the broader policy prevails of permitting them throughout the state; in others, branches are prohibited.

(Note: For the collation of detailed information on this subject we are indebted to the excellent brief of John A. Garver as Amicus Curiae, q. v., p. 5.)

Nor is there any necessity of hampering the national banks of the country in their legitimate growth by an iconoclastic construction of this statute. They were designed to aid the Government in an important function; they cannot do this unless they prosper; they cannot prosper unless they are permitted legitimate growth. They suffer not at all in comparison

with any state institutions in the matter of safeguarding the funds of the community and meeting their obligations to those who patronize them.

Dealt with, according to its terms, as well as in the light of the probable reason for its enactment, and R. S. Sec. 5190, while limiting (by implication) the business of national banks to the place (*i. e.*, the city, town or village) designated in its organization certificate, was not designed or intended to prescribe physical contact for the office or place of business of such, nor to limit them to a single place of business within the geographical limits prescribed.

DEPARTMENTAL CONSTRUCTION.

It is urged that there has been a departmental construction of R. S. Sec. 5190 to the contrary of that for which we here contend, and such as to require, under prior decisions of this Court, that that construction be adopted.

The statute is a part of the National Bank Act as re-enacted and revised June 3, 1864 (13 St. L. 102, Ch. 106, Sec. 8). So far as appears, its interpretation does not seem to have arrested attention until August of 1889, when Solicitor Hepburn of the Treasury Department appears to have interpreted the statute as intending that a national bank should have *but one* office in the city designated in its

charter. The occasion for this consideration of the question does not appear.

In 1911 a national bank in Atlanta inquired of the Comptroller whether objection would be made to the establishment by it of a branch bank in that city. The Secretary of the Treasury asked the opinion of the Department of Justice. Mr. Brown, special assistant to the Attorney-General, wrote an opinion in which he arrived at the conclusion that the power existed; Mr. Assistant Attorney-General Fowler arrived at the contrary conclusion. The Attorney-General approved of the latter opinion (29 Op. Atty.-Genl. 81). This opinion recognized that it was a doubtful question and one for the courts to determine; and further that the Comptroller of the Currency was vested with no control or discretion with respect to such a function, if such existed—*i. e.*, that the bank either had the right or did not have it, according as the statute was interpreted, and the Treasury Department could neither confer it nor take it away by departmental action.

In 1920, in Instructions as to Organization of National Banks, issued by the Comptroller (p. 110, chapter 9), the department apparently accepted this opinion of the Attorney-General as correctly defining the powers of national banks.

But, *at this time,* the department has adopted the contrary construction. The Comptroller is sanction-

ing the establishment of branch offices by national banks in the cities of their location, when necessary to keep them in a state of proper competition with state institutions enjoying similar privileges (1922 Supp. to Pratt's Digest of the Laws of Banking, p. 7).

Quoting the excellent brief of Mr. John Quinn, *amicus curiae*, as to information gleaned by him from the records of the Comptroller's office:

> "The extent to which national banks in recent years have been brought into competition with state banks and branches of state banks in many of the large cities of the United States is shown by the following compilation made in the office of the Comptroller of the Currency:
>
> "In Detroit, Michigan, there are three national banks and one branch office. The three national banks are in close proximity to each other in the downtown business section. In competition with those three national banks are fourteen state banks which have 189 state bank branches. To this number should be added eleven state banks in suburbs of Detroit. Those eleven state banks in the suburbs have ten branches.
>
> "In the District of Columbia fourteen national banks have seven branch offices. Thirty-six non-national banks have eight branch offices.
>
> "In Cincinnati there are twenty-two national banks with no branches. There are thirty-eight state banks with thirty branches.

"In Columbus there are seven national banks with no branches. There are seven state banks, one of which has seven branches.

"In Cleveland there are three national banks with two national bank branch offices. There are eighteen state banks with a total of seventy-five state bank branches.

"In New Orleans there is one national bank with no branch office. There are six state banks with thirty-eight branch offices.

"In Atlanta there are three national banks with six branches. There are thirteen state banks, one of which has four branches.

"In Nashville there are five national banks with no branches. There are nine state banks with seven branches.

"In Richmond there are six national banks, one of which has four branch offices. There are twenty-three state banks with eight branches.

"In Baltimore there are twelve national banks, one of which has two branch offices. There are forty-six state banks with twenty-one branches.

"In Buffalo there are four national banks, one of which has a branch office. There are twelve state banks with forty branches.

"In Oakland, California, there are three national banks with no branch offices. There are seven state banks with thirty state bank branches.

"In Boston there are thirteen national banks with one branch office. There are twenty state banks with twenty-three branches.

"In San Francisco there are seven national banks with no branch offices. There are eighteen

state banks with forty-three state bank branches.

"In Los Angeles there are twenty-four national banks and six national bank branch offices. There are twenty-five state banks with one hundred and eight state bank branches.

"In the City of New York there are thirty-two national banks with forty-three branches. There are nineteen state banks with one hundred and thirty-nine branches. There are twenty trust companies with sixty branches. It will thus be seen that as against the forty-three branches of national banks there are one hundred and ninety-nine branches of state banks and trust companies in competition therewith."

It is, of course, manifest that R. S. Sec. 5190 cannot mean one thing in Missouri and another in New York; and that if, under the law of its being, *one* national bank in the United States possesses power to establish branch offices in the city of its residence to better serve its customers and meet competition, then *all* such have like power.

It is upon such facts that it must be determined whether there has been such a departmental construction of this statute as precludes this Court giving it the meaning which flows from the natural significance of the language employed in its enactment. Consideration of the fundamentals upon which the doctrine of departmental construction rests fairly answers this inquiry in the negative.

In Studebaker v. Perry, 184 U. S. 259 (269), Mr. Justice Shiras, writing the opinion, expressed a limitation on the doctrine thus:

> "The doctrine invoked is a useful one, but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance."

There is, of course, here no such situation. No rights have accrued under the opinion of the Attorney-General which will in anywise be disturbed by a different interpretation of the statute, if the Court does not agree with his opinion. It is said in the printed brief of the learned Attorney-General of the state that the state, in the adoption of its own statute, has been influenced by the alleged policy of the National Government. The suggestion is gratuitous and probably not well founded. It certainly creates no *noblesse oblige* upon the National Government. The state statute might be changed while this case is receiving deliberation.

In United States v. Pugh, 99 U. S. 265 (269), Mr. Chief Justice Waite, speaking for the Court, remarked:

> "It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the

contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

The essential elements of the doctrine were thus summed up by Mr. Justice Blatchford, for the Court, in United States v. Hahn, 107 U. S. 402 (406), where, in affirmance of the opinion of the Court of Claims, he said:

> "The Court added that such construction did not appear to it unreasonable, and might well have been reached in the exercise of a sound judgment, and that, regarding the statute as ambiguous, all the circumstances of the case were such as to justify the application of the principle of interpretation sanctioned by this Court in *United States v. Pugh*, 99 U. S. 265, that, 'in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect (*Edwards' Lessee v. Darby*, 12 Wheat. 210),' and where this Court refused to interfere with such construction after it had been acted upon for a long time."

In Swift & Co. v. United States, 105 U. S. 691 (695), Mr. Justice Matthews said:

> "The rule which gives determining weight to contemporaneous construction, put upon a statute by those charged with its execution, applies only in cases of ambiguity and doubt."

To the same effect is United States v. Graham, 110 U. S. 219, and other cases there cited.

In Merritt v. Cameron, 137 U. S. 542 (551), Mr. Justice Lamar, speaking for the Court, said:

> "A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons."

In United States v. Healey, 160 U. S. 136 (145), it was held that where the practice of the department

charged with the administration of the law had not been uniform, the statute must be interpreted without reference to departmental practice.

In Louisville & Nashville Railway Company v. Kentucky, 161 U. S. 677 (690), it was held that mere inaction by a department could not be treated as "contemporaneous construction."

In Wisconsin Central Railway Company v. United States, 164 U. S. 190 (205), departmental construction was denied influence because it had been "neither contemporaneous nor continuous."

From these utterances and others of similar import it seems not difficult to deduce the true rule on this subject.

Apart from those instances where private rights have been acquired under the departmental construction (which is not the case here), such departmental construction is allowed to have weight only when the following conditions co-exist: (a) The departmental interpretation must have been contemporaneous with the enactment of the statute; (b) it must have been long continued; (c) it must have been uniform; (d) it must have been by the officer or department charged with the duty of executing the statute, and (e) the statute must be couched in ambiguous language. It is respectfully insisted that none of these elements are to be here found.

(a) The statute was enacted in 1864. No question appears to have arisen in the Treasury Department until 1889. All that occurred then was an opinion of the Solicitor of the department. The occasion for that inquiry does not appear. A quarter of a century intervened between the enactment of the statute and the concern of the Treasury Department as to its true meaning; and the opinion of the Attorney-General was not sought until 1911—twenty-two years later. The construction was not contemporaneous.

(b) There has been no long-continued interpretation of the act by any department, or in any manner. In 1889 the Solicitor of the Treasury expressed his views concerning the true meaning of the act; in 1911 the Attorney-General did likewise; in 1920 the Comptroller of the Currency promulgated the views of the Attorney-General; and in 1922 he made rulings and gave sanctions to a different interpretation, which has been acted on by numerous national banks.

(c) There has been no uniformity in the departmental interpretation. In 1911, on application by a bank for sanction of the institution of a branch office, the department (we assume) denied it, on the faith of the opinion of the Attorney-General; in 1922 the department gave sanction to numerous such applications. Not only that, but special counsel for the State in this proceeding stated at the bar of the state

court that they had brought the actions of this plaintiff in error here complained of to the attention of the Comptroller of the Currency, and of the Attorney-General of the United States, and they had each declined to interfere.

(d) This is not such a statute as will admit of the application of the rule of departmental construction. Many statutes require administrative duties on the part of officials and departments in their execution. It is the manner in which the statute is thus administered "by officers charged" with its execution which, under proper conditions, is permitted to become a part of the statute and control its interpretation. It is official *acts*, not *words*, to which the rule looks.

Those organizing a national bank must designate the city, town or village in which they would do business (R. S. Sec. 5134) and procure the approval of the Comptroller of the plan (R. S. Secs. 5168, 5169). If the bank afterwards desires to remove to some other city, his approval must also be had (Act of May 1, 1886, 24 St. L. 18, Ch. 73).

But, within the designated city, town or village, the selection of the place of business of the bank is solely the function of its board of directors. The Comptroller takes neither power nor duty in that respect. If it must do business under a single roof, it is because it is so restricted by the Congress, and

the Comptroller can neither enlarge the restriction nor relieve of it. If it is not so restricted by the act, the Comptroller cannot provide such. Therefore, the statute is not one for the application of this rule, because no administrative acts are possible, under its terms, in the sense that administrative acts may, under some circumstances, become a part of and control the interpretation of statutes which require affirmative acts of administration.

LEGISLATIVE INTERPRETATION.

It is also contended that the Congress have construed the statute contrary to the views herein expressed.

Reference is made in this connection to R. S. Sec. 5155 (Act of March 3, 1865, 13 St. L. 484, C. 78, Sec. 7), providing for the nationalization of state banks. It is argued that, because this statute authorizes state banks to become national banks, and retain any branches they may have been operating under the state law, the Congress which enacted the authorization were of opinion that the National Bank Act denied this power to corporations organized under its provisions.

But the terms of this statute are such as to negative any such conclusion. In the first place, it manifestly dealt with branch banking in the sense that it is practiced abroad, *i. e.*, wellnigh independent in-

stitutions, with separate capitalization and separate (but subordinate) management and control.

The authorization is that state banks may become nationalized and retain branches, "*the capital being joint and assigned to and used by the mother bank and branches in definite proportions.*" Without knowing the circumstances, the specific terms of this statute seem to indicate that it was passed with respect to the particular situation of a particular state institution or institutions. The war was on; the exigency was great. To induce state banks to come into the national institution was a matter of moment. The statute may have been enacted *quia timet.* It certainly confers powers, in this respect, which no one contends are to be found in the National Banking Act. We have noticed the wellnigh independent branches which the act authorizes state institutions to bring into the national system. No one contends that such a power subsists under the National Bank Act. The statute may have been enacted for this reason.

Other considerations should also be noted. In terms of this statute a state bank located, say, in San Francisco, with numerous branches located downstate, having separate management (under the same board of directors) and with the capital assigned in definite proportions to the mother bank and the branches, is authorized to come into the national system and continue its operations as theretofore.

As a result of the combined terms of R. S. Secs. 5134 and 5190, a bank organized under the act must designate the city, town or village in which it will do business, and must remain therein. The statute under consideration may have been enacted for that reason; and because state banks operating branches outside their respective home towns, either desired, or were desired, to become nationalized. R. S. Sec. 5155, therefore, confers powers upon state banks entering the national system plainly withheld by the National Bank Act from the institutions organized thereunder. And this is true without supposing that the Congress, in the enactment of R. S. Sec. 5190, intended to restrict the banks, organized under the act, to a single building, or to deal with the physical structure of the place of business they were required to maintain.

In other words, R. S. Sec. 5155 may well be accounted for without supposing that that Congress believed its predecessor to have intended to hamper the national banks, proper, by unreasonable and unnecessary restrictions in the conduct of their affairs.

Reference is also made to the Act of May 12, 1892 (27 St. L. 33, Ch. 71), authorizing the officials of the World's Columbian Exposition to designate a Chicago national bank to operate a branch bank on the exposition grounds during the period of the continuation thereof; also to the similar Act of March 3, 1901

(31 St. L. 1444, Ch. 864 Sec. 21), dealing with the same subject with respect to the Louisiana Purchase Exposition, to be shortly held at St. Louis.

But neither of these statutes convey any certain intimation as to the belief of the Congress as to the proper interpretation of prior enactments. They each were passed, more to deal with the powers of the Commissioners for these two expositions in the matter of selecting financial agencies than to give expression to the views of the Congress as to powers of national banks under the Act of 1863-1864. In the case of the St. Louis Exposition this is made plain by the language of the act as a whole, providing the Commission and defining its duties, of which this statute is a component part.

The Act of May 12, 1892, relating to the Chicago Fair, was quite as visibly in amendment of the act of the preceding Congress creating the Commission and defining its powers (26 St. L. 62, Ch. 156). Each of these statutes dealt not with the powers of national banks under their charters, but with the powers of the Commissioners of these two expositions, with respect to banking privileges to be exercised on the grounds. In the case of St. Louis, at least, this is made manifest by the language of the enactment, which authorizes the Commissioners to confer the privilege *upon any national bank or state bank or*

trust company located anywhere in the State of Missouri.

These statutes furnish no aid in arriving at the true interpretation of R. S. Sec. 5190.

Though not referred to by the learned Attorney-General, mention may be made also of the Act of April 26, 1922, dealing with branch banks in the District of Columbia. The official statutes not being yet available (to us, at least), we quote this enactment thus:

> "That no corporation that is not now engaged in the business of banking in the District of Columbia shall, after the passage of this act, be permitted to enter upon said business in the said district, nor shall any corporation now or hereafter engaged in the business of banking be permitted to establish branch banks in said district until after it shall have secured the approval and consent of the Comptroller of the Currency; and each one of the officers of such corporation so offending shall be punished by a fine not exceeding $1,000 or imprisonment not exceeding one year, or by both fine and imprisonment, in the discretion of the Court."

As to which we observe that the language used is such as to indicate that the Congress apparently believed they were regulating an existing power, not conferring one previously denied.

But upon what considerations is it to be assumed that the members of the 69th Congress, which enacted this last-mentioned statute, the 56th, which dealt with the St. Louis Exposition, the 52nd, which dealt with the Chicago Fair, or even the 38th, which enacted (as a part of a revenue law) the invitation of state banks into the national system, possessed information as to the true meaning to be given to R. S. Sec. 5190, which is not equally and alike available to all of us?

In this land of multiplicity of legislation, where statutes are not always scientifically written and are frequently uncertain both in their assumptions and their expressions, there is no more unreliable guide to the interpretation of a statute than argumentative inferences from subsequent legislation.

In Postmaster General v. Early, 12 Wheat. 136 (148), Mr. Chief Justice Marshall, speaking for the Court, observed that "a mistaken opinion of the Legislature concerning the law does not make law."

In United States v. Claflin, 97 U. S. 546 (548), are these observations by Mr. Justice Strong, writing the opinion:

> "But that clause indicates a belief on the part of Congress that it had been previously repealed and, doubtless, that it was repealed by the Act of 1866. The indication is found in the

words that declare all parts of acts not contained in the revision, but other portions of which are, to have been repealed or superseded by subsequent acts. This, however, though entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief."

And in District of Columbia v. Hutton, 143 U. S. 18 (27), Mr. Justice Lamar, speaking for the Court, said:

"It is manifest, however, from an inspection of this section that there was no recognition in it by Congress that said section 354 was still subsisting law. But even if Congress had supposed that that section was still the law, when as a matter of fact it had been repealed, it would make no difference in this consideration (Postmaster General v. Early, 12 Wheat. 136, 148; Town of South Ottawa v. Perkins, 94 U. S. 260, 270; United States v. Claflin, 97 U. S. 546, 548). The question is, was said section 354 repealed by the Act of 1878? That is a judicial question, to be determined by the courts upon a proper construction of that section and subsequent legislation upon the same subject matter, and is not for the legislative branch of the Government to determine."

In Endlich on Interpretation of Statutes (Ed. 1888),

Sec. 372, on the authority of certain utterances of the English courts therein cited, it is said:

> "But an act of Parliament does not alter the law by merely betraying an erroneous conception of it, so as to make it accord with the conception."

Neither the course of subsequent legislation, nor yet of departmental construction, has been such as to wrest R. S. Sec. 5190 from the meaning to be deduced from the language employed in its enactment. Its meaning is believed to be as herein contended, and not as asserted by the Attorney-General of the State.

Upon which considerations it is respectfully but earnestly submitted that the opinion of the Supreme Court of Missouri is in error as to the matters therein considered, and that it should be reversed.

FRANK B. KELLOGG,
JAMES C. JONES,
FRANK H. SULLIVAN,
For Plaintiff in Error.

JONES, HOCKER, SULLIVAN & ANGERT,
506 Olive Street,
St. Louis, Mo.